Petition

81-373

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., LT. JOSEPH DICARLO, LT. THOMAS NAPLES, LT. PHILIP LYNCH, FIREFIGHTER THOMAS O'CONNELL, LT. FRANK G. BENDER, LT. ROBERT B. ANDERSON
Petitioners,

v.

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM CARY, CHARLES R. YOUNG, HERMAN AGOSTO, HARMIN LINARES, ISMAEL POMALES, SALVADOR PEREZ, and on behalf of all other similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FOR MERIT EMPLOYMENT,
INC., et al.

August 24, 1981

QUESTIONS PRESENTED

1. May a Title VII remedy order compel a city to appoint unqualified persons to its fire department who have not had their competitive qualifications measured by a professionally developed ability test?

2. May a broad Title VII hiring quota rest on the employer's failure to correct by affirmative action pre-Act racial imbalance?

3. May a court impose an extended promotional freeze as a Title VII remedy which destroys the careers of incumbent firefighters and endangers all firefighters?

4. After a finding of pattern or practice liability under Title VII must an employer be permitted to show that if hiring had been fair certain presumptive victims of the practice would not have been started?

5. May a Title VII remedy order give jobs to persons who never applied for them when there is no reason to believe that these persons were deterred from applying by the employer's past practices?

PARTIES

The parties are as follows:

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM CARY, CHARLES R. YOUNG, HERMAN AGOSTO, HARMIN LINARES, ISMAEL POMALES, SALVADOR PEREZ, and on behalf of all others similarly situated,

Plaintiffs

-v-

CITY OF BRIDGEPORT, NICHOLAS PANUZIO, ROBERT W. WEEKS, JR., EDWARD F. DALEY, JULIUS NOBILI, WILLIAM G. PJURA, FRANK J. DEPRINZIO, ALAN COHEN, BRIDGEPORT CIVIL SERVICE COMMISSION, CHARLES E. PORZELT, ANDREW GOTTFRIED, SALVATORE S. SPADACCINO, CHARLES J. DOUGIELLO, JOHN J. HANNON, JOHN F. GLEASON, DAVID SULLIVAN, WILLIAM D. MIKLUS, ALBERT SCHWARZ, BRIDGEPORT BOARD OF FIRE COMMISSIONERS, JOHN MANDANICI, individually and in their official capacities.

Defendants

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., LT. JOSEPH DICARLO, LT. THOMAS NAPLES, LT. PHILIP LYNCH, FIREFIGHTER THOMAS O'CONNELL, LT. FRANK G. BENDER, LT. ROBERT B. ANDERSON,

Intervening Defendants

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit on the second appeal is not yet reported. The slip opinion is reprinted in Appendix A. The opinion of the United States District Court for the District of Connecticut on remand from the first appeal is reported at 479 F. Supp. 101 (D. Conn. 1979) and reprinted in Appendix B. The opinion of the Second Circuit on the first appeal is reported at 594 F.2d 306 (2d Cir. 1979), and reprinted in Appendix C. The original order of The District Court with respect to liability is reported at 454 F. Supp. 751 (D. Conn. 1978) and reprinted in Appendix D. The original order of the District Court with respect to remedy is reported at 454 F. Supp. 758 (D. Conn. 1978) and reprinted in Appendix E.

JURISDICTION

The opinion of the Court of Appeals was filed on April 8, 1981, and judgment entered on that day. Petitions for rehearing *en banc* were denied on May 29, 1981. Jurisdiction to review the judgment in question by writ of certiorari is conferred by 18 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, sections 703 (h) & (j), 42 U.S.C. §§ 2000e (h) & (j), and 706 (g), 42 U.S.C. § 2000e-5 (g).

Title VII, Civil Rights Act of 1964, Section 703 (h), 42 U.S.C. § 2000e-2(h)
(b) Notwithstanding any other provision of this title, it shall not be unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work

in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 206(d)).

Title VII, Civil Rights Act of 1964, Section 703(j), 42 U.S.C. § 2000e-2(j)

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Title VII, Civil Rights Act of 1964, Section 706(g), 42 U.S.C. § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

ASSOCIATION AGAINST DISCRIMINATION
IN EMPLOYMENT, INC., et al.

vs.

CITY OF BRIDGEPORT, et al.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Bridgeport Firefighters For Merit Employment, Inc., et al., Intervening Defendants in the above-entitled action, hereby respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 8, 1981.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

This is an employment discrimination class action brought in 1975 by Blacks and Hispanics ("minorities") against the City of Bridgeport, Connecticut. The Plaintiffs say that the City violated Titles VI & VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Revenue Sharing Act, 31 U.S.C. § 1242(a), in recruitment and hiring for the fire department. Slip Op. at 6934, App. 3a.

The Plaintiffs are the Association Against Discrimination In Employment, Inc. ("ADE"), a Connecticut nonprofit corporation, ten individual minorities, and a class of persons similarly situated. Slip Op. at 6936, App. 5a. The Defendants are the City of Bridgeport ("City") and certain of its officials. The Intervening Defendants, whose petition for certiorari this is, are Bridgeport Firefighters for Merit Employment, Inc. ("BFME"), and certain current members of the fire department. BFME is a nonprofit Connecticut Corporation representing non-minority members of the Fire Department. Slip Op. at 6937, App. 5a. Its aim is to preserve firefighter hiring and promotion on the basis of merit. The Intervening Defendants' goal is simple — to obtain truly qualified firefighters without reference to race, creed or politics T 1936.[1] Participation in this action is a means of achieving this goal. T. 1939-40 as well as insuring qualified fellow workers in this life-endangering job.

In 1974 the City had 153,000 citizens. 454 F. Supp. at 754, App. 80a. The district court made no exact findings on the minority composition of the City's population and the relevant labor market. Slip Op. at 6995, App. 57a-58a. The district court found the population to be 41% minority due to an admission by the City, 479 F. Supp. at 105, App. 73a, and later used the same figure for the labor market. 479 F. Supp. at 115, App. 92a. The court of appeals also used this figure, though it stated that the figure "is somewhat problematical" and its use under other circumstances might have been an abuse of discretion. Slip Op. at 6995, App. 57a-58a.

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[1] References to the trial transcript are "T," without date.

The City's charter, regulations and ordinances set forth a strict civil service system that eliminates all discretion in fire department hiring. T. 1919. The hiring process starts with an announcement. Applicants must submit applications within a fixed time. 479 F. Supp. at 108, App. 78a. There are four preliminary requirements: each applicant must be eighteen years old, have a driver's license and a high school diploma or equivalent, and be a City resident for one year. Slip Op. at 6935, App. 4a. Applicants are notified by letter which admits them to a written examination. 479 F. Supp. at 108, App. 79a. Those who pass take medical and agility tests. Slip Op. at 7006, App. 67a. Finalists are ranked on an eligibility list in order of written exam grade. 479 F. Supp. at 109 n. 10; App. 81a n. 10.

The present action was brought shortly after release in 1975 of the results of a new written exam. Slip Op. at 6933, 6936, and App. 3a, 5a. In 1965, 1968 and 1971 the City administered entry level firefighter exams which produced disparate impact. Slip Op. at 6951, App. 17a. Motivated by the desire to avoid this result, the prospect of federal aid and the impending application of Title VII to municipalities (and the threat of lawsuits), the City sought a completely new test instrument. 594 F. 2d at 308, App. 107a.

In early March, 1972, the City joined a consortium of Connecticut cities which in getting a federal grant to develop a fully validated, job related and non-discriminatory firefighter selection procedure. 594 F. 2d at 308, App. 107a. The consortium chose Hay Associates, Inc., a respected consulting firm, to construct the written portion of the procedure, *Id.* Hay Associates reviewed testing instruments, chose those least unfair towards minorities and well regarded in the professional literature and performed a validation study. 454 F. Supp. at 755 & n.4, 757, App.   . The City actively cooperated with Hay Associates. 454 F. Supp. at 757, App. 108a. Construction of the exam took $100,000 dollars and 2,745 man hours. *Id.*

The City administered its new exam to 771 applicants, of which 110 were minorities. Slip Op. at 6936, App. 5a. More minorities applied than for any previous exam, due to recruiting performed by minority organizations. 479 F. Supp. at 107-108, 108 n.9, App. 76a-79a, 79a n.9. Unfortunately, the new test proved to have significant disparate impact, in large part because of its scoring procedure. The City charter demands a 75% passing score. Without consulting Hay Associates the City decided that only those applicants ranking over the 75th percentile, or a score of 12, could pass. The result was that whites passed 3.8 times as often than minorities. 479 F. Supp. at 109 n.10, App. 81a n.10. If the test had been scored at 6, minorities would have passed 79% as frequently as whites — close to the 80% measure adopted by the EEOC. *Id.* Nevertheless, the City remained confident that the exam was validated and job-related, and published an eligibility list based on its results.

B. PROCEEDINGS BELOW.

The Plaintiffs' initial complaint alleged violations of Title VII, 42 U.S.C. §§ 1981 and 1983, and pendent state law claims. When defendants demanded a jury trial plaintiffs later withdrew their 1981 and 1983 claims and certain punitive damage claims, and added new claims based on Title VI, 42 U.S.C. § 2000d and the Revenue Sharing Act, 31 U.S.C. § 1222. Slip Op. at 6936, App. 5a. During pretrial proceedings the City obtained permission for reasons of public safety to do interim hiring from the challenged 1975 exam. Eighty-four persons were hired on the condition that an equal number of positions be left open and funded, and that the interim hiring be counted part of any remedy order. Slip Op. at 6937, App. 5a-6a.

The district court, Hon. T. F. Gilroy Daly, tried the liability phase in the case in the fall of 1977. The evidence related predominantly to the design, implementation and job-relatedness of the 1975 exam. *See* 454 F. Supp. 751, App. D. The court refused to hear evidence of the minority composition of the relevant City labor market, although it did deem admitted by the City certain figures which showed that at that time the relevant labor market was 41% minority. 454 F. Supp. at 754; App. D. The court also found no bad faith on the part of the City. 454 F. Supp. at 757.

In July, 1978 the district court found that the City's use of the new 1975 test had violated Title VII because it produced substantial disparate impact and had not been proven job-related. The court reserved decision on the Plaintiffs' Revenue Sharing Act claim and failed even to mention Title VI. 454 F. Supp. 751; App. D.

In September, 1978 the district court issued a sweeping remedy order. The City was directed to hire forthwith all otherwise qualified minority persons who had applied to take the 1975 exam, whether or not they had passed. The City was then to make a "pool" of minorities. All further appointments up to a total of 84 — the post-1975 hiring — were to come from the pool. After that, 50% of all appointments were to come from the pool up to a total of 125 minorities. The district court issued similarly broad promotional and backpay orders. Slip Op. at 6940, App. 8a.

This remedy posed a direct physical threat to the existing firefighters represented by BFME. The district court had ordered the City to place in active service minority candidates who had never passed any ability test. Inevitably, some of these minority candidates would not be qualified for the job, and their performance would endanger the members of the fire department and the citizens of Bridgeport. The remedy also provided a windfall for some minorities who would not have received a position even if the City's hiring had been performed according to law.

All Defendants appealed. The Second Circuit Court of Appeals on February 23, 1979 vacated the district court orders and remanded for further consideration. 594 F.2d 306, App. C. The court of appeals found that the record below did not support the remedy order because the district court had failed to consider: (1) recent Supreme Court and Second Circuit decisions on quotas; (2) the effect of the interim hiring; and (3) the possibility that rescoring the exam might eliminate disparate impact. Slip Op. 6940-43, App. 8a-10a.

The district court held two short hearings on remand, both limited to the court of appeals decision and the personnel needs of the fire department. The defendants tried without success to supplement the trial record, most notably to show the minority composition of the relevant workforce. The district court also excluded evidence offered by the Plaintiffs on the City's receipt of federal funds under Title VI. Slip Op. at 6945-47, App. 12a-14a.

The order issued on remand rested on a different basis than the first, but was even more sweeping. The district court drew on some limited background evidence received at trial to find a "pattern or practice" of intentional discrimination based not only on the 1975 test, but on the earlier exams, the City's failure to recruit, and the City's bad treatment of minority applicants. The district court imposed an immediate 100% hiring quota of 102 minorities, to be filled whether or not there were 102 victims of the two tests. The remedy order issued on remand sought to match the racial composition of all fire department hiring since 1971 with the 41% minority racial composition of the City. The order again required the hiring of minorities who had not taken a written examination. The district court based its second order on Title VI, in addition to Title VII and the Revenue Sharing Act, so that its remedial jurisdiction would extend to hiring done prior to March 24, 1972, the effective date of Title VII. 497 F. Supp. 101, App. B.

The new order was even more objectionable to the intervening Defendants than the first. It contemplated an extended period during which the only persons placed on the force would be 102 untested minority candidates. This would pose a safety hazard. It also contemplated hiring not only persons who never passed any test, but persons who would not have passed an examination or indeed never applied — persons who would receive windfall benefits due solely to race.

The Defendants again appealed. On April 8, 1981 the Second Circuit, through a panel composed of Judges J. Edward Lumbard, Ellsworth Van Graafeiland and Amalya Kearse, affirmed in part, reversed in part and remanded. Slip Op. 691, App. A. Judge Kearse, writing for the court, upheld the district court's finding of pattern or practice liability for intentional discrimination, but held that the City was not liable under Title VI because the record did not show that the City fire department had received federal funds "primarily for employment." Slip Op. 6973-78, App. 39a-43a. The remedy in consequence was modified to cure only the effects of post-Title VII hiring. A total of 73 minorities must be offered jobs to make the hiring done since March 24, 1972 have the same 41% minority composition as the City population. The offers were to go first to the so-called actual victims of discrimination, those who had unsuccessfully applied for a firefighter position. Any remaining positions would be filled by non-applicants who showed that they had been eligible to apply but had been deterred by the City's reputation. All hirees would receive full backpay. Slip Op. at 6993, App. 61a. The court of appeals also froze all promotional examinations for persons hired since March 24, 1972 off the 1971 and 1975 lists until the new minority hirees had served three years time-in-grade and become eligible to take them. Slip Op. 6999-7001, App. 61a-964a.

All Defendants applied for rehearing *en banc.* The applications were denied on May 29, 1981. The Defendants' motions for stay were also denied, but the District Court has not yet entered a final order following the second remand.

ARGUMENT

I. A TITLE VII REMEDY ORDER SHOULD NOT COMPEL A CITY TO APPOINT UNQUALIFIED PERSONS TO ITS FIRE DEPARTMENT WHO HAVE NOT HAD THEIR COMPETITIVE QUALIFICATIONS MEASURED BY A PROFESSIONALLY DEVELOPED ABILITY TEST.

The remedy order directs the City to hire persons entirely without regard to qualifications. Some of the "victims" of discrimination took the 1975 test but were not appointed. Others applied but didn't take the test. Still others never applied, but all will be appointed if they can show that in 1975 they had a high school diploma or equivalent, were of proper age, and had a driver's license. None will have to take any competitive ability test. Slip Op. at 6999, App. 61a.

This part of the remedy order violates the letter and spirit of Title VII. It also puts the firefighters and citizens of Bridgeport in danger. Almost certainly some of the hirees will be unable to perform on the job. This is likely because their qualifications are unknown, there was no upper age limit on applying for the exam, and because the City has been encouraged by the court to hire first those applicants who have earned the least since failing to be appointed. 479 F. Supp. at 119, App. 102a-103a. This may reduce the backpay award but it does not inspire confidence in those hired.

Title VII is rooted in the belief that both public and private welfare must be maximized by giving opportunities competitively, to those who will take the best advantage of them.

> Nothing in the Act [Title VII] precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. *Congress has not commanded that the less qualified be preferred over the more qualified simply*

> *because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor,* so that race, religion, nationality and sex become irrelevant.

Griggs vs. *Duke Power Company,* 401 U.S. 424, 430 (1971) (emphasis added). Professionally developed ability tests are specially approved in Section 703(h) of the Act. *See Griggs,* 401 U.S. at 434-36 (legislative history). As this court recently observed: " '*the broad, overriding interest, shared by employer, employee and consumer is efficient and trustworthy workmanship* assured through fair and neutral employment and personnel decisions.' *McDonnell-Douglas, supra,* [411 U.S. 792 (1973)] at 801, 93 S.Ct, at 1823." *Texas Dept. of Community Affairs* vs. *Burdine,* ______ U.S. ______, 101 S.Ct. 1089, 1096 (1981) (emphasis added). Obviously the public interest in competitive efficiency is very high in the case of municipal protective services. *See, e.g., Davis* vs. *City of Dallas,* 387 F. Supp. 389, 394 (N.D. Tex. 1980).

The district court's remedy order ignored this interest. It held that because the 1975 test was not job related, it did not measure performance on the job, and hence anyone otherwise qualified would be just as competent as the persons who had passed the test. 479 F. Supp. at 115. App. 93a. The court ignored the fact that the test was *not* proven completely valueless. Though the City was unable to prove it job related, this very expensive professionally developed test retained some value as a screen for the obviously unfit. *See Boston Chapter, N.A.A.C.P.* vs. *Beecher,* 504 F.2d 1017, 1021-22 (1st Cir. 1974). It validity may have been low, but "[t]he greater the human and economic risks of failure on the job, the lower the correlation which will be required of the selection device (predictor)...." B. Schlei & P. Grossman, Employment Discrimination Law 130 (1976); *see Townsend* vs. *Nassau County Medical Center,* 558 F.2d 117, 120 (2d Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978). The danger in appointing completely untested firefighters should have persuaded the court to apply the Intervening Defendants' remedy plan. All hiring would be done in fixed ratios from white and minority pools made up of persons who had passed the 1975 test scored at six. 479 F. Supp. at 109 N.10, App. 81a. This plan would give race-conscious hiring relief without losing the benefit of the test.

But even if the test is discarded no hiring should have been ordered without measurement of comparative liability to perform on the job. *Franks* vs. *Bowman Transportation Company* holds that individuals seeking jobs after a pattern or practice finding cannot be denied jobs for lack of qualifications which were not demanded of white incumbents. 424 U.S. 747, 773 n.32 (1976). But the fact remains that some persons *are* more qualified than others. *Franks* did not address the problem of high-risk public jobs. Title VII remedies are flexible, *equitable* adjustments of competing interests. *See generally City of Los Angeles* vs. *Manhart,* 435 U.S. 702 (1978); *Teamsters* vs. *United States,* 431 U.S. 324 (1977). The public interest must be considered. The City did not deliberately abandon qualifications. It gave the 1975 test in good faith thinking that it was measuring ability. 454 F.Supp. at 757, App. . When the district court decided years later that the persons who passed were not qualified, the remedy was not to hire even more unqualified persons, but to increase qualified minority hiring.

The district court was not obligated to order jobs for every applicant and deterred potential applicants. Courts have refused to order a person hired as a remedy for discrimination when *that* person in *that* job would be useless to both the employer and the employee. *See* Schlei & Grossman, *supra,* at 331 (1979 Supp.) (citing cases). Hiring relief, like seniority relief and backpay, can be denied for reasons which, if applied generally, would not frustrate Title VII's central purpose of eradicating discrimination throughout the economy and making the victims of discrimination whole. *Cf. Albemarle Paper Company* v. *Moody,* 422 U.S. 421 (1975). Though a new job-related test might exclude some class members, they could be compensated in other ways and the result would further, rather than frustrate, the central purpose of Title VII.

II. A BROAD TITLE VII HIRING QUOTA CANNOT REST ON THE EMPLOYER'S FAILURE TO CORRECT, BY AFFIRMATIVE ACTION, PRE-ACT RACIAL IMBALANCE.

The district court justified the finding of pattern or practice liability, and later broad quota relief, in large part on the "gross" disparity between the minority percentage of the labor market and minority representation on the fire department. 479 F. Supp. at ______, App. 73a. The court of appeals did likewise. Slip Op. at 6997-98, App. 60a-61a.

Both courts erred in holding that the existence of the City's racially imbalanced fire department violated Title VII. Section 703(j) says that it is not a violation to fail to maintain racial balance with the labor market. This Court in *Hazelwood School District* vs. *United States,* 433 U.S. 299, 309-10 (1977) held that proof in such pattern or practice cases should look to post-Act hiring decisions. If post-Act hiring is *not* the cause of the disparity, there is no violation. *Cf. United Steelworkers of America* vs. *Weber,* 443 U.S. 193, 204-07, 207 n.7 (1979).

The City did little hiring between March 24, 1972 and 1977, the date of the trial. As the court of appeals pointed out, even if 41% of the hiring resulted in minority appointments, the racial composition of the department would not have changed greatly. Slip Op. at 6998, App. 61a. Since the proper labor market figure is much smaller, the racial imbalance of the workforce could not, under § 703(j), be considered a "gross disparity" supporting pattern or practice liability.

This finding supports the view that the only "victims" of the City's discrimination are those minorities who would have been appointed after Mar. 24, 1972 from the 1971 list and the 1975 exam. This would be the minority percentage of the relevant applicant pools. If the City was held liable for failure to recruit, then the victim class would be measured by the minority percentage of the relevant labor market. These individuals could be located and tested, obviating the need for a goal or quota.

No decision of this court states that the remedial power of court under Title VII goes beyond compensating the identified victims of discrimination and ordering lawful conduct in the future. *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) held that private employers could voluntarily prefer minorities to whites without violating Title VII, but the opinion distinguished Title VII remedies. *Id.,* at 200. Similarly, *Fullilove* v. *Klutznick,* 448 U.S. 449 (1980) held that Congress could premise receipt of federal benefits on race when necessary to cure the harmful effects of past discrimination which had been the subject of clear legislative findings. This Court again distinguished judicial remedies:

> When we have discussed the remedial powers of a federal court, we have been alert to the limitation that "[t]he power of the federal courts to restructure the operations of local and state government entities 'is not plenary....' [A] federal court is required to tailor 'the scope of the remedy' to fit the nature and extent of the violation.' " 448 U.S. at 480.

The court of appeals tries to avoid this fundamental limit on its remedial powers by stretching the concept of the "identifiable victim" of discrimination. But any estimate of the number of victims of discrimination based on the City's population is excessive when the violation itself would be measured by a labor market narrowed by qualifications, such as term of residence, age, and education, not possessed by the City population as a whole. *Hazelwood,* 433 U.S. at 308 n.13. The hiring order imposed here is not a remedy in any sense, but a judicially commanded affirmative action plan which exceeds the court's power under 42 U.S.C. § 2000e-5(g) and is prohibited by §2000e-2(j). Prospective measures and make-whole relief to a limited class of identified victims is the only proper remedy.

III. A COURT MAY NOT IMPOSE AN EXTENDED PROMOTIONAL FREEZE AS A TITLE VII RELIEF WHICH DESTROYS THE CAREERS OF INCUMBENT FIREFIGHTERS AND ENDANGERS ALL FIREFIGHTERS.

This Court has held that rightful place seniority is the starting point for seniority relief except in the presence of "unusual adverse impact." *Franks* vs. *Bowman Transportation Company,* 424 U.S. 747, 779 n.41 (1976). The district court, apparently recognizing the risks in putting untested applicants in command, preferred to stop all promotions for incumbents hired off the 1971 or 1975 lists for three years, or until all new hirees become eligible to take them. 479 F.Supp. at 117, App. 97a-98a; Slip Op. at 6999-7001, App. 61a-64a.

This portion of the remedy order unlawfully infringes on the seniority rights of incumbents, without contributing towards safety. The persons hired from the 1971 and 1975 lists will have to wait three years after the completion of minority hiring — a process that could consume one year, Slip Op. at 6990, App. 54 following the end of all dispute over the remedy — to even compete for promotion. By then they will then have between 8 and ten years experience and will have been on the job between a half and a third of their time in the department. The delay alone is a serious liability in itself. This Court urged a sensitive, flexible approach towards "the legitimate expectations of other employees innocent of wrongdoing." *Teamsters,* 431 U.S. at 372. The district court could have put together a financial package which would have compensated new hirees without harming existing employees.

But delay is not the only hardship. Although experienced firefighters could expect to do overwhelmingly better on promotional exams than new hirees, 594 F.2d at 312 n.14, App. 115 n.14, too great a disparate impact in promotions will exacerbate racial tensions and drag the district court into the fire department once again. This is especially true since acting supervisors, those who naturally become permanent supervisors, are denied any preference. 479 F.Supp. at117, App. 98a. Inevitably, morale and discipline will suffer as former acting supervisors are forced to serve under less experienced hirees. No one will be happy — the minority applicant who fails the test and loses rightful place seniority, or the incumbent who misses the place he has sought for so long. The public interest demands that the seniority order be modified.

IV. AFTER A FINDING OF PATTERN OR PRACTICE LIABILITY UNDER TITLE VII AN EMPLOYER MUST BE PERMITTED TO SHOW THAT IF HIRING HAD BEEN FAIR CERTAIN PRESUMPTIVE VICTIMS OF THE PRACTICE WOULD NOT HAVE BEEN HIRED.

The order of proof in the remedy phase of a Title VII pattern or practice case is set forth in *Teamsters* v. *United States,* 431 U.S. 324, 359-62 (1977) and *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 722 (1976). After a pattern or practice finding individual class members are presumed entitled to jobs and back pay on showing that they applied and were rejected. The employer may then rebut the presumption by showing a lawful refusal to hire due to lack of vacancies or inadequate qualifications. This right is guaranteed by §706(g), 42 U.S.C. § 2000e-5(g). The individuals in turn may then show that the employer's reasons are pretextual. *Teamsters,* 431 U.S. at 361-62, 362 n.50.

The order of proof was seriously distorted in this case. The trial, the initial liability and remedy orders and the first appeal all used a disparate impact theory aimed at the 1975 exam. 454 F.Supp. at 753, App. 102a. Evidence of the City's minority population and individual instances of discrimination was received with an eye to a future quota remedy for "egregious" discrimination under Second Circuit precedent. *See e.g. Kirkland* v. *New York State Dept. of Correctional Services,* 520 F.2d 420, 427, 429 (2d Cir.), *reh. en banc denied,* 531 F.2d 5 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976).

The district court found a pattern or practice of discrimination for the first time on remand. It did so on essentially the original record. At that time the district court should have heard evidence from the City that certain individual failures to hire were lawful. Instead it ordered substantial quota relief which included jobs and backpay for every unsuccessful applicant for the 1971 and 1975 exams. 479 F. Supp. at 115, App. 93a-94a. The court of appeals approved this procedure. Slip Op. 6963-6964, App. 50a-56a.

The Defendants could have shown that not everyone would have received a job. *Teamsters* does not say that a rejected applicant is entitled to a job, but to "an employment *opportunity.*" 431 U.S. at 362 (emphasis added). That opportunity may be the chance to compete with others for limited vacancies. In such cases the court must equitably determine who is going to get the job. *See, e.g., Teamsters.* 431 U.S. at 371-72. The remedy tracks the violation. *See Id.*, 431 U.S. at 372-76.

In the civil service system no applicant can legitimately expect a job. Hundreds of persons compete for places on an eligible list. Each applicant has a right to expect that "employment opportunity" which he or she would get from a fair, nondiscriminatory exam.

This is another flaw in the remedy approved by the court of appeals. Many minority applicants would have not gotten a job if the exam had been fair. Statistics introduced by the Plaintiffs themselves show that the minority percentage of the relevant labor market — that composed of persons eligible to apply for the exam — was approximately 15.2%. Pl. Exh. 1 (1970 Census). The minority applicants could have expected to fill no more than a fairly distributed 15.2% of the eligible list. To give more jobs than 15.2% of that hiring to minority applicants creates inequitable windfalls.

This argument is not the same as the practice, rejected in *Franks* and *Teamsters,* of forcing applicants to prove their qualifications for the job. *Franks,* 424 U.S. at 772-73; *Teamsters,* 431 U.S. at 358-59. The Defendants were entitled to show that a percentage of the minority applicants would not have gotten jobs "for any reason other than discrimination." Competence and vacancies are highly relevant to the decision to award jobs as part of a pattern or practice remedy order. *Franks,* 424 U.S. at 773 n.32. The remedy order imposed here ignored these factors and distorted the rule of *Franks* and *Teamsters.*

V. A TITLE VII REMEDY ORDER SHOULD NOT GIVE JOBS TO PERSONS WHO NEVER APPLIED FOR THEM WHEN THERE IS NO REASON TO BELIEVE THAT THOSE PERSONS WERE DETERRED FROM APPLYING BY THE EMPLOYER'S PAST PRACTICES.

The court of appeals approved the district court's award of jobs and back pay to persons who proved by a preponderance of the evidence that they were deterred from applying by the City's hiring practices and can prove that they were qualified to apply for the exam. Slip Op. at 6992-6993, App. 50a n.23, *citing Teamsters* vs. *United States,* 431 U.S. 324 (1977). This order misapplies the applicable standard. Persons who did not apply for jobs should not be afforded the chance to claim deterrence when there is no distinct group of persons who are reasonably likely to have been deterred.

The facts in *Teamsters* show that this Court did not intend to permit members of the general public to claim deterrence and obtain a job with seniority and backpay. The deterred employees in *Teamsters* were incumbent "city-operations" employees and "servicemen" who had been excluded from "line-driver" positions. They were virtually qualified, willing to work, had access to the terminals, were healthy and of working age, and knew of the higher-paying line-driver jobs. 431 U.S. at 330 n.4, 368 n.52. The Government claimed that these facts showed that such employees must have been deterred. This Court disagreed, saying that although it is more likely that they were deterred than members of the general public, 431 U.S. at 368 n.52, each applicant would have to meet "the not easy burden of proving that he would have applied for the job if it had not been for [the employer's discrimination]." 431 U.S. at 368.

In this case there is no identifiable, virtually qualified pool of persons who were almost certainly deterred. There is the minority portion of the population of Bridgeport. The Social Master appointed by the district court to find out who has been deterred will have an impossible task — there will be nothing to distinguish hundreds of clamoring "victims" of discrimination. This use of *Teamsters* stretches the concept of the deterred victim beyond its breaking point.

For all of the foregoing reasons the Petitioners respectfully ask that the Petition for a Writ of Certiorari be granted.

BRIDGEPORT FIREFIGHTERS FOR
MERIT EMPLOYMENT, INC., ET AL
INTERVENING DEFENDANTS

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A Member of the Bar of this Court

August 24, 1981

Appendix

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Office-Supreme Court, U.S.
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CLERK

No. 81-373

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BRIDGEPORT FIREFIGHTERS FOR MERIT
EMPLOYMENT, INC., LT. JOSEPH DICARLO,
LT. THOMAS NAPLES, LT. PHILIP LYNCH,
FIREFIGHTER THOMAS O'CONNELL,
LT. FRANK G. BENDER, LT. ROBERT B. ANDERSON
Petitioners,
V.
ASSOCIATION AGAINST DISCRIMINATION IN
EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG
KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM
CARY, CHARLES R. YOUNG, HERMAN AGOSTO,
HARMIN LINARES, ISMAEL POMALES, SALVADOR
PEREZ, and on behalf of all other similarly situated,
Respondents.

APPENDIX

VOLUME ONE

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August 24, 1981

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INC., et al.

VOLUME ONE

Pages

APPENDIX A.

Association Against Discrimination In Employment, Inc. v. *City of Bridgeport,* ____ F.2d ____, Slip Op. 6931 (April 8, 1981) 1a-69a

APPENDIX A

UNITED STATES COURT OF APPEALS

Nos. 549, 1103, 1228 — September Term 1979

(Argued April 30, 1980 Decided April 8, 1981)
Docket Nos. 79-7650, -7652, -7709

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM CARY, CHARLES R. YOUNG, HERMAN AGOSTO, HARMIN LINARES, ISMAEL POMALES, SALVADOR PEREZ, and on behalf of all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

-v.-

CITY OF BRIDGEPORT, NICHOLAS PANUZIO, ROBERT W. WEEKS, JR., EDWARD F. DALEY, JULIUS NOBILI, WILLIAM G. PJURA, FRANK J. DEPRINZIO, ALAN COHEN, BRIDGEPORT CIVIL SERVICE COMMISSION, CHARLES E. PORZELT, ANDREW GOTTFRIED, SALVATORE S. SPADACCINO, CHARLES J. DOUGIELLO, JOHN J. HANNON, JOHN F. GLEASON, DAVID SULLIVAN, WILLIAM D. MIKLUS, ALBERT SCHWARZ, BRIDGEPORT BOARD OF FIRE COMMISSIONERS, individually and in their official capacities,

Defendants-Appellants-Cross-Appellees,

and

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., JOSEPH DICARLO, THOMAS NAPLES, PHILIP LYNCH, BRUNO BRESSIE, THOMAS O'CON-

NELL, FRANK G. BENDER, and ROBERT B. ANDERSON,

Intervenors-Defendants-Appellants-Cross-Appellees.

Before: LUMBARD, VAN GRAAFEILAND and KEARSE,
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, *Judge*, finding City of Bridgeport liable for employment discrimination in violation of Titles VI and VII of the Civil Rights Act of 1964 and the Revenue Sharing Act, and ordering broad affirmative relief.

Affirmed in part, vacated in part, and remanded for modification.

DAVID N. ROSEN, New Haven, Conn. (Michael P. Koskoff, Bridgeport, Conn., on the brief), *for plaintiffs-appellees-cross-appellants.*

JOHN J. McNAMARA, Bridgeport, Conn. (Raymond B. Reubens, Bridgeport, Conn., Bruce A. Nelson, John L. Beers, Steven B. Berlin, Wendy L. Tice-Wallner, Morrison & Foerster, San Francisco, Calif., on the brief), for *defendants-appellants-cross-appellees.*

J. DANIEL SAGARIN, Bridgeport, Conn. (Harrigan, Hurwitz, Sagarin & Rutkin, P.C., Bridgeport, Conn., on the brief), *for intervenors-defendants-appellants-cross-appellees.*

STEVEN H. ROSENBAUM, Washington, D.C. (United States Department of Justice, Drew S. Days, III, Asst. Attorney General, David L. Rose, Washington, D.C., on the brief), for United States as *amicus curiae.*

McGUINESS & WILLIAMS, Washington, D.C. (Robert E. Williams, Douglas S. McDowell, Washington, D.C., on the brief), for Equal Employment Advisory Council as *amicus curiae.*

KEARSE, *Circuit Judge:*

This employment discrimination suit, now before this Court for the second time, was commenced in 1975 in the United States District Court for the District of Connecticut on behalf of black and hispanic residents of Bridgeport, Connecticut against the City of Bridgeport and other individuals responsible for hiring firefighters for the City of Bridgeport (hereinafter collectively the "City"). The plaintiffs contend that the City unlawfully discriminated in entry-level hiring practices for the Bridgeport Fire Department, in violation of Titles VI and VII of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. §§ 2000d to 2000d-6, and 2000e to 2000e-17 (1976), and the antidiscrimination provision of the State and Local Fiscal Assistance Act ("Revenue Sharing Act"), 31 U.S.C. § 1242(a) (1976). After trial, the district court ruled that a 1975 examination administered by the City violated Title VII. 454 F. Supp. 751 (D. Conn. 1978). The court enjoined further use of the exam, and ordered various remedial measures, including requirements that only minority[1] candidates be hired until their number equaled the number of white candidates hired since 1975 and that thereafter one-half of all vacancies be filled by minority candidates until there were 125 minority firefighters in the force. 454 F. Supp. 758 (D. Conn. 1978).

On appeal, this Court concluded that the opinions below provided an insufficient basis for review of the sensitive questions raised by "sweeping affirmative relief, including hiring quotas." 594 F.2d 306, 309 (1979) (*"ADE v. Bridgeport"*).

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[1] The term "minority" has been used in this case to refer to black and hispanic persons, and will be so used in this opinion.

Accordingly, the district court's order was vacated and the case remanded for further consideration. Following a limited hearing on remand, the district court reaffirmed its original determination that the City was liable under Title VII, determined that the City was also liable under Title VI and the Revenue Sharing Act, and modified in several respects the relief ordered. 479 F. Supp. 101 (D. Conn. 1979.)

On this appeal the City and the intervening current firefighters challenge the findings of liability under Title VI and liability under Title VII prior to 1975, and they attack most aspects of the remedial order. Plaintiffs have cross-appealed, challenging two limited aspects of the relief granted. For the reasons below, we generally affirm the decision of the district court, but vacate the finding of liability under Title VI and remand portions of the remedial order for modification.

I. FACTS AND PRIOR PROCEEDINGS

Since 1936, the City's process of selecting its firefighters has included the giving of a written examination. In 1972, having had only two minority firefighters since 1936, having recently been sued for employment discrimination in its police department, and perhaps recognizing the approaching applicability of Title VII to municipalities, Bridgeport joined ten other Connecticut cities in hiring a consulting firm to develop a new exam for firefighters. The resulting exam was administered by the City in 1975. In order to qualify for firefighters positions, candidates were required to achieve a score in or above the 75th percentile of those taking the exam; they were then ranked according to their scores. In addition, a 1975 candidate was required to pass medical and physical agility tests, be over the age of eighteen, be a high school graduate or have earned high school equivalency certification, have resided in the City for at least one year just prior to taking the written exam, and hold a valid Connecticut driver's license.

Of the 661 white candidates who took the 1975 exam 184, or 27.8%, passed. Of the 110 minority candidates who took the exam, eight, or 7.3%, passed.

A. The Complaint

The initial complaint in this action was filed on September 2, 1975, by the Association Against Discrimination in Employment and ten individual plaintiffs who are black or hispanic residents of Bridgeport, on behalf of themselves and all others similarly situated. The plaintiffs alleged that the City had engaged in a "policy and practice of discriminating on the basis of race, color and/or national origin against minority group members" and that minority group members "are currently being denied initial employment and promotion in the Bridgeport Fire Department." The original complaint attacked the 1975 test as well as the City's prior practices, asserting claims under 42 U.S.C. §§1981 and 1983 (1976), and Title VII; the complaint was amended several times, as plaintiffs withdrew the claims under §§ 1981 and 1983 and added allegations of violation of Title VI and the Revenue Sharing Act, and alleged the filing of charges with the Equal Employment Opportunity Commission ("EEOC"). Unless otherwise noted, reference hereafter to the "complaint" are to the third amended complaint in its final form.

In July 1976, Bridgeport Firefighters for Merit Employment, Inc. ("BFME"), a non-profit organization, was permitted to intervene as a defendant and cross-claimant, representing "non-firefighters minority within the Bridgeport department of fire services." BFME's cross complaint sought relief from any injury which might be done to nonminority firefighters by the City as a result of any modification of the City's existing hiring or promotional practices.

B. Interim Hiring from the 1975 List

Shortly after the intervention of BFME, plaintiffs learned of the City's plans to make immediate appointments from the list of eligible candidates generated by the 1975 exam, and moved for a preliminary injunction against such appointments. The motion came before Judge Newman, who issued an order, on consent of all parties, permitting defendants to "make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding." The order further stated that "[i]n the event the Court should order a hiring plan, these appointments will be counted as part of such plan." Pursuant to this order 40 firefighters were hired commencing in October 1976.

In 1977 the City sought to hire additional firefighters from the 1975 list. On June 13, 1977, the parties agreed, before Judge Zampano, that the City could hire additional firefighters from that list under substantially the same conditions as those set forth in Judge Newman's order. Thereafter 44 additional firefighters were hired.

Of the 84 firefighters hired pursuant to the interim orders, 81 were white and three were minorities.

C. The Trial Court's Initial Decision

In 1978, following a substantial period of discovery, an eleven-day trial with respect to liability was held before Judge Daly. The court found that the City had violated Title VII. It observed that although minorities comprised 41% of Bridgeport's population the Bridgeport Fire Department, 428 members strong, had only one minority firefighter prior to the 1975 exam. The court found that the 1975 exam "did little to alter this imbalance": only eight of the 192 candidates who passed it were members of minority groups, and the pass rate for nonminority candidates was more than three times that for minority candidates. The court concluded that these statistics left "no doubt that the firefighters exam had a disparate impact on the named plaintiffs and the class of persons they represent." 454 F. Supp. at 754.

As to the merits of the test itself, the court found that it was doubly flawed. First, the exam had no rational relationship to the skills needed in firefighting. The test was developed, by the consulting firm retained for that purpose, without compiling any list of critical work behaviors and with no effort to rank the rated skills in terms of their importance to the job.[2] 454 F. Supp. at 755-56. Indeed, in handing down his order on remedy, Judge Daly noted that the Bridgeport Fire Chief had testified at the remedy hearing "that there might be an inverse correlation between those who passed the exam and those who are most qualified to be firefighters." *Id.* at 759. For example, while the Fire Chief stated that superior physical ability and intelligence are the two most important attributes, the 1975 hiring process used simply a pass-fail physical agility test, and the 1975 written exam weighed negatively any high scores on comprehension questions, thus "Penaliz[ing] those who indicated that they were 'inquiring, curious, analytic, exploring, intellectual, reflective, incisive, investigative, probing, logical, scrutinizing, theoretical, astute, rational [and] inquisitive.'" *Id.*[3] Ironically, the court noted that the 1975 exam "represented a decided improvement over some of the earlier civil service exams employed by Bridgeport." 454 F. Supp. at 757.

The second flaw in the 1976 exam lay in the City's selection of 12 as the minimum passing score, a choice that the Court found "bore no relation to 'normal expectations of proficiency.'" *Id.*[4] (quoting 19 C.F.R. § 1607.6 (1977)). The court found that lowering the passing score from twelve to six would have significantly alleviated the discriminatory impact of the exam.

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[2] The court noted, for example, that having a feel for public relations was ranked just as highly as composure under pressure.

[3] Although eleven cities joined in having the test developed, only Bridgeport chose to use it after seeing the questions.

[4] The passing score on the 1975 exam was set at 12—the score that marked the 75th percentile in performance. It is not clear why this cutoff was chosen; Bridgeport's City Charter required that candidates answer correctly at least 75% of all exam questions, not that passing candidates be better than 75% of those taking the exam.

The court concluded that the use of the 1975 exam could not be continued, and it awarded a variety of relief to minority candidates for firefighter positions. Because it had found the 1975 exam not job related, the court began "with the premise that the firefighters exam administered in 1975 did not distinguish qualified from unqualified applicants." 454 F. Supp. at 759. Since testimony showed that the 84 firefighters hired while the case was pending were adequately performing thier duties and since their scores on the non-job-related exam did not demonstrate that they were any better qualified than those who failed, the court found it "fair to assume that all of the applicants who are able to pass the same agility test and medical examination will be capable of performing at least as well as the eighty-four men already hired." *Id.*

With the goal of "remedying the disparate impact of the firefighters exam by placing those frustrated applicants on a parity with the eighty-four men who have been hired," 454 F. Supp. at 759-60, the court ordered the immediate hiring or "Blacks and Hispanics who filed applications with the civil service office for the 1975 firefighters exam and who pass both the agility test and the medical examination." These applicants were also awarded backpay and seniority retroactive to October 1976. Once the 1975 minority applicants were hired, the City would have been required to make all future selections from a pool of qualified minority candidates until the number of minority candidates hired since 1975 equaled the number of white candidates hired since that time, and then to hire one-half of all firefighters from the minority pool until the number of minority firefighters totaled 125.

D. The First Appeal

Defendants appealed to this Court, attacking both the finding of liability and the remedy. They contended, *inter alia*, that their selection of an employment test was an administrative decision that could not be overturned if supported by substantial evidence, and that the relief ordered amounted to the imposition of a quota that was unconstitutional, unlawful under § 703 (j) of Title VII, and unwarranted by the facts. Plaintiffs cross-appealed, arguing that the district court had improperly limited backpay to those minority candidates who had taken the exam in 1975 and were to be appointed pursuant to the court's order, rather than including minority candidates who had taken the exam in 1975 but no longer desired appointment or no longer met the prerequisites and minority candidates who had been deterred from applying by defendants' past discriminatory practices.

This Court recognized that "[n]o manner of legal argument can justify" the virtual absence of minorities on the force, 594 F.2d at 308, but found the district court's opinions trebly inadequate to permit resolution of the challenges to the relief ordered. First, it was not clear that the district court had considered any of this Court's recent opinions dealing with quotas. We offered the following guidance with respect to those opinions:

> Looking to the decisions of our own court, it is reasonably clear that for some of its members quota relief can constitutionally be justified only if necessary to redress 'a clear-cut pattern of long-continued and egregious racial discrimination,' and if the reverse discriminatory effects of the quota do not fall upon 'a small number of readily identifiable' non-minority persons. *Kirkland* v. *New York State Department of Correctional Services*, [520 F.2d 420, 429 (2d Cir.), *rehearing denied*, 531 F.2d 5 (2d Cir. 1975), *cert denied*, 429 U.S. 823 (1976)].

594 F.2d at 310. Thus we instructed the district court to consider the relevant authorities expressly and to make appropriate findings, answering such questions as (a) whether its ruling on liability was based on discrimination before or after 1972, and on what theories it relied, and (b) why the quota required the

hiring of minorities in a ratio that exceeded their representation in the group of applicants who took the 1975 test.

Second, it was not apparent what effect the district court had given to the two pretrial orders that had permitted the City to hire 84 firefighters from the 1975 list. Various interpretations were possible. Plaintiffs contended, for example, that the parties had impliedly agreed that if the test were held invalid, the hiring of 84 blacks and hispanics could immediately be ordered. BFME, on the other hand, contended that plaintiffs had agreed to the interim orders in order "to avoid an early hearing and. . .in exchange for guaranteed funding for positions which might, but not necessarily would, be assigned to minority group members." *Id.* at 312 (footnote omitted). The City contended that the interim orders immunized it from any backpay liability. Since the district court had not explicitly considered the implications of the interim orders, we instructed it to do so on remand.

Finally, we noted the district court's stated view that the disparate impact of the exam could have been significantly alleviated by lowering the passing score. While declining to express a view as to "whether an employer who selects a cut-off score and defends it until the test has been found not job-related can then avoid the implications of that finding by adjusting the passing score to a point where the disparate impact is arguably insignificant," 594 F.2d at 313 n.20, we directed the district court to explore, on remand, the possibility

> that some plan which accepts the reduction of the passing mark to six and treats the list as a qualifying list without ranking, subject to passing physical and medical examinations, would, as an interim measure, afford substantial minority representation and be acceptable as part of an overall settlement that the parties may still discover to be the most sensible course of all.

Id. at 314.

II. PROCEEDINGS LEADING TO THE PRESENT APPEAL

A. Structuring of Issues for Consideration on Remand

On remand, the parties expressed varying views as to the proper scope of the new proceedings. BFME, apparently envisioning a completely new trial of all the issues in the case, served on plaintiffs requests for more than 180 admissions of "fact," ranging from the basic concept of civil service hiring, to the validation of the 1975 test,[5] to the state of employment discrimination law in this Circuit. Plaintiffs and the City set considerably narrower sights. The City stated that it wished to submit further evidence on three issues that it described as follows:

> 1. The effect on disparate impact if the passing score is reduced from 12 to 6 and differential adjustments are made.
>
> 2. Adopt a plan which accepts the score reduction and treats this list as a qualifying list without ranking, subject to passing physical and medical examinations, which would afford substantial minority representation on the Fire Department.
>
> 3. Whether the City has a long history of notorious discriminatory practices in its hiring policies?

Plaintiffs, expressly reserving their position that the City could not avoid liability "by manipulation of the passing score after having been found to have discriminated," stated that they had no objection to presentation of further evidence on the City's first and third issues, nor on the second to the extent that it simply reflected the City's position with respect to remedy.

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[5] For example, Request No. 107 stated: "Lack of detail on the job analysis used in constructing the 1975 test was an asset rather than a detriment to the accuracy of the test."

Plaintiffs proposed, in addition, to submit evidence with respect to the current manpower needs and vacancies within the fire department, and with respect to Title VI. As to the latter, plaintiffs stated as follows:

> After the trial in this case the Supreme Court addressed issues relating to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, issues which are raised in the pleadings in this case. The record is not clear with respect to the relevance of Title VI to this case, in that there is no evidence relating to receipt of federal funds by the City other than Revenue Sharing funds. The record should be developed on this issue, by having the record reflect the City's receipt of funds, in order to avoid the necessity for a remand at some future time.

In a prehearing order, the district court reviewed the directions given by this Court on the first appeal and determined that a broad-ranging evidentiary hearing was uncalled for. Directing that any additional evidence be limited to that suggested by this Court's opinion and that necessitated by the passage of time since the district court's original remedy order, Judge Daly ruled that the issues as to which supplementary evidence would be permitted were the effect of the interim hiring orders, the effect of lowering the passing score on the 1975 exam, and the present personnel needs of the fire department. Discovery on other issues was denied. The court stated that further findings with respect to the appropriateness of quota relief would be based on the prior record.

B. The Supplementary Presentations of Evidence

An evidentiary hearing was held, limited to the three issues specified by the district court. The defendants offered expert testimony as to various candidate selection methods by which the disparity in pass rates on the 1975 test could be eliminated, assuming the passing level were lowered from twelve to six.[6] Plaintiffs offered expert testimony to show that lowering the passing score from twelve to six would not eliminate the disparate impact of the exam because it would merely decrease the disparity in pass rates from 20.5 percentage points to 14.2 percentage points, still a highly significant statistical difference.[7] The defendants' expert conceded that merely lowering the test score, without also adopting one of the methods he espoused, would not eliminate the disparate impact of the exam.

Testimony on issues other than those specified in the court's prehearing order was rejected. Thus, when the defendants proferred the testimony of a statistician and a chart to show that the percentage of minorities in the Bridgeport labor market of persons over the age of 18 with a high school diploma would not exceed 18%, the court sustained plaintiffs' objections on the ground that this issue had been fully litigated at trial and the evidence was beyond the scope of the hearing. Similarly, when plaintiffs called the City's Comptroller to testify on the subject of the City's use of federal funds in the fire department, to support their Title VI claim, the court sustained the City's objection that such testimony would be outside the scope of the hearing. The court stated, after ascertaining that the City's budget was published, that judicial notice would be taken of the budget.

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[6] The witness described three possible approaches. The first involved creation of two pools—white candidates and minority candidates—and the selection from each pool, according to rank within the pool, of a number of candidates in proportion to the number who took the exam. Under the second approach, one applicant pool would be created with a sufficient proportion of minority individuals to make it likely that random selection from the pool would result in minority hires in proportion to the number of minority applicants. The third approach involved creation of separate minority and nonminority pools, with candidates selected at random from each pool in proportion to the number of applicants who took the exam.

[7] Plaintiffs' expert testified that the likelihood that such a difference would be attributable to chance would be less than five chances in one thousand.

It does not appear that the entire published budget was ever presented to the court. Subsequent to the hearing, plaintiffs filed the affidavit of a paralegal employed by plaintiffs' counsel, annexing photocopies of four pages described as part of the City's "Public Employment Employee Roster." The affidavit stated that these pages showed that in 1971 and 1972, "some federal money," provided under the Emergency Employment Act, "was used by the City to hire personnel for the Fire Department."

C. The Decision on Liability

Following the submission of such supplementary evidence as was allowed, the district court made detailed findings of fact and set forth its conclusions of law.

The court found that, even had there been no additional evidence of discrimination, the statistical evidence alone would have established a prima facie case of discriminatory impact. In 1975, when black and hispanic persons comprised approximately 41% of the labor force, the City's fire department had 427 whites, one hispanic, and no blacks. In its entire history prior to 1975, the City had employed only two minority firefighters, one of them hired in 1938. Following the institution of the present suit, the City had, pursuant to the two orders permitting interim hiring, hired 84 firefighters; 81 of them were white. The court noted that the City's hiring of minorities approached the "inexorable zero.'" 479 F. Supp. at 109 n.9, quoting *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342 n.23 (1977).

"Not suprisingly," the court found, the City had a strong reputation for discrimination in employment. Indeed, its "reputation for employment discrimination against black and hispanic persons...was 'by far the worst' of all cities in Connecticut." 479 F. Supp. at 106. The court found that the City's reputation, as well as certain of its actions, described below, deterred minority persons from even applying for City employment: "This reputation created the attitude in the black community that '[i]f you're black, just don't apply because you won't get the job.'" *Id.*

As to the merits of the 1975 test, the court found again that it was not job related and that it had a disparate impact on minority candidates. The court expressly incorporated its original findings with respect to the invalidity of the test, *see* Part I. C. *supra.* In addition the court found that certain parts of the exam were significantly discriminatory against blacks, and that certain of the test score data were improperly used. If adjustments were made for the improperly used data, using the 1975 test as a predictor of job performance would be "'about as good...as tossing a coin.'" *Id.* at 110 n.10, quoting testimony of Dr. John Peck.

In answer to one of the questions posed by this Court on the first appeal, Judge Daly found that merely reducing the passing level on the 1975 exam from twelve to six would not spare the City liability for unlawful discrimination. First, the court concluded, on the basis of testimony from experts on both sides, that such a reduction would decrease, but not eliminate, the disparity between the pass rates of whites and minorities; and the resulting disparity would still prove discriminatory impact. The court also concluded that it would be inappropriate for the court to order hiring on the basis of, and to undertake administration of, an employment test that had been proven to have no relation to job skills. Finally, the court found that even if the disparate effects of the 1975 test could be eliminated by lowering the passing level, the City could not avoid liability for employment discrimination, because it had "engaged in a policy and practice of discrimination extending well beyond the 1975 exam." *Id.* at 109-10 n.10.

The court found that the City had made little or no effort to recruit minority persons for the fire department. Noting that, despite its awareness of its discriminatory policies and reputation, the City had not adopted any affirmative action program until it was forced to do so in order not to lose some $7 million in federal funds, the court found that "[n]o voluntary efforts have been made by the City to comply with its own affirmative action goals for the Fire Department." *Id.* at 113 n.12. The court found that "[a]bsolutely no attempts were made to recruit minority applicants" for fire department examinations prior to 1972, *id.* at 106, and that no significant recruiting efforts were made by the City thereafter. *Id.* at 107. The court found that the City's pre-1972 failure to recruit minority persons for the fire department was deliberate.

Indeed, the court found that the City had "engaged in a continuing pattern and practice of...actively deterring minority persons who have sought to become firefighters." *Id.* at 104-05. For example, it found that, while a coalition of community minority groups, coordinated by a local official of the United States Labor Department, was attempting to recruit minority candidates for the fire department, the City probably impeded these efforts. The City Civil Service Commission's personnel director furnished the coalition with a notice of the 1975 examination, and stated that familiarilty with fire department tools, knowledge of first aid and knowledge of the geography of Bridgeport would be covered on the test. The coalition then, in sessions open to anyone, regardless of race, gave applicants training in these subjects. But the subjects covered by the 1975 test bore no resemblance to these areas; there were no questions involving geography, or first aid, or the use of firefighting equipment. *Id.* at 107-08. The understandable reaction of the minority applicants who had studied these rather pertinent subjects, only to be confronted with a test that did not mention them, was, "'[t]he City has fooled us again.'" *Id.* at 108.

The court found that the City had also engaged in several acts of discrimination against individual minority candidates. Plaintiff Ismael Pomales, for example, took the 1975 exam and passed it. However, he did not receive any notification that he had passed until he was informed that his name was being removed from the eligible list because he had not appeared for the physical agility test that those who passed the written exam were required to take. Other candidates were prevented from even taking the written test. One such candidate, class member Elias Castro, an hispanic with four years' experience as a firefighter in the United States Air Force, attempted to file his application with the Civil Service Commission in the middle of the afternoon on the last day for filing applications. He was told that is was too late. He was not allowed to speak to the superior of the person who told him it was too late, and he was not informed of any means by which he could appeal or lodge an official complaint. He did not get to take the 1975 exam. Another candidate, plaintiff Harmin Linares, filed his application before the deadline and was told that a notice would be mailed to him stating the date and time of the exam. He never received such a notice, and he did not get to take the exam.

Finally, the court found that the City's discrimination against minorities was of long duration. It reveiwed the written firefighter exams that the City had given in 1965, 1968, and 1971. It found that none of these tests was job related and that all had had a disparate impact on minority applicants. For all these pre-1975 tests combined, those identified as nonminority candidates[8] had passed at the rate of better than one out of every three; of eighteen identified minority applicants, only one had passed. *Id.* at 108 n.9.

Thus, the court concluded that the City had "engag[ed] in a policy and practice of discrimination against black and hispanic persons relative to entry-level hiring in the Bridgeport Fire Department," *id.* at 111; *see id.* at 111-12; and that its pattern of discrimination was "'clear-cut[,]...long-continued and egregious.'" *Id.* at 112.

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[8] Of the 384 applicants who took the three tests, the races of 53 were unknown. All 53 failed the examinations. The court noted that even if it were assumed that all 53 were white—the hypothesis most unfavorable to plaintiffs' claims—the pass rate for whites would be reduced only from 36.2% to 30.9%, a percentage far above the 4.8% minority pass rate.

On the basis of these findings the court concluded that the City had violated Title VII, which prohibits discrimination in employment on the basis of race. Noting that the Title VII had not become applicable to municipalities until March 24, 1972, the court found that the combination of the statistical evidence, the City's use after that date of the results of the discriminatory examination held in 1971, and the City's policy and history of discrimination, including its deliberate failure to recruit minority applicants, compelled the conclusion that the City's violation of Title VII dated back to March 24, 1972.

Relying on many of the above findings, the court concluded also that the City's discriminatory policies and practices violated Title VI, dating back to January 1, 1971. Stating that Title VI prohibits such discrimination in "'any program or activity receiving Federal financial assistance,'" *id.* at 111, quoting 42 U.S.C. § 2000d (1976), the court held that the City's receipt of such funds had been adequately proven.

Finally, the district court found that the City had received revenue sharing funds in every year since 1973, and that it had expended these funds, in part, for the operation of its Fire Department. The court concluded that the City's discriminatory practices had therefore violated the Revenue Sharing Act since January 1, 1973.

D. The Remedy

In light of its expanded findings and conclusions, the district court fashioned a new remedial order, which we set forth in pertinent part in the margin.[9] The order banned any further use of

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[9] A. OLD EXAMS

The test batteries given as written exams to firefighter candidates in 1971 and 1975 shall not again be used to test firefighter applicants.

B. HIRING

(1) The City promptly shall prepare a list of 102 minority persons to be offered positions as firefighters. This list shall include:

> (a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City. Said agility test and medical examination shall be given to these persons within 120 days of this order, shall be preceded by both published notice and individual written notice to each of those black and hispanic persons who filed applications for the 1971 or 1975 firefighters test, and shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.
>
> (b) Sufficient additional minority persons chosen in accordance with this subparagraph to reach the total of 102 persons. The persons chosen under this subparagraph shall be individuals who prove to the special master that after January 1, 1971 they were deterred by the City's discriminatory practices from applying to take either the 1971 or 1975 test, and who pass both the agility test and medical examination to be administered by the City. The following procedure shall be used to identify these persons:
>
> > (i) The special master shall, in a manner he deems appropriate, publicize the fact that he will be accepting applications from minority persons who claim that January 1, 1971 they were deterred by the City's discriminatory practices from filing applications for either the 1971 or 1975 firefighters test. The special master shall set and publicize a reasonable deadline for the submission of such applications.
> >
> > (ii) The special master shall process the applications in a manner consistent with this opinion, and may hold hearings or other proceedings as he deems appropriate.

(iii) Each individual applicant shall bear the burden of proving by a preponderance of the evidence that he or she would have applied but for the City's discriminatory practices.

(iv) The special master need not process every application, but may choose among them at random until sufficient applications have been processed to complete the list of 102 minority persons to be offered employment.

(v) The agility test and medical examinations shall be administered to persons chosen by the special master at a time to be determined by the special master, and shall be preexamined. The agility test and medical examination shall be no more rigorous than those that have been administered to firefighters hired since January 1, 1971.

(c) If the procedures under subparagraphs (a) and (b) of this paragraph fail to produce sufficient individuals to fill the 102 minority persons to be offered employment.

(2) Notwithstanding the above, the City shall not be obligated to place on the list the name of anyone who

(a) on or before the date of the exam for which he or she applied or would have applied but for the City's discrimin ation

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license; or

(iv) had not been a bona fide resident of Bridgeport for the past year, or

(b) does not possess a valid Connecticut driver's license on the date the name otherwise would be placed on the list, but

(c) nothing in this paragraph shall alter or limit the City's obligation ultimately to place 102 names on the list.

(3) As quickly as possible within the limits of the City's ability to train new firefighters, the City shall offer the 102 persons on the list active employment as firefighters and shall place those who accept on active duty. The City shall make a good faith effort to maximize its ability to train firefighters. No other individuals shall be hired as firefighters until all of the individuals on the list have been offered active employment.

(4) Subsequent appointments to the rank of firefighter shall be made in strict accordance with Titles VI and VII of the Civil Rights Act in 1964.

(5) The City actively shall recruit minority persons to compete for future vacancies in the Fire Department.

(6) This Court shall retain jurisdiction over this case until the provisions of this Order have been complied with.

C. SENIORITY

[16] The City is prohibited from giving any promotional examinations to firefighters hired from lists generated by the 1971 or 1975 tests until such time as all the firefighters hired pursuant to B(1)(a) & (b) become qualified to take the promotional examination for the positions of Pump Engineer and Lieutenant, the Court is not opposed to a reduction of this requirement. The plausibility of producing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior fighting experience of a number of the plaintiffs.

D. BACK PAY

(1) The City promptly shall generate a list of up to 102 persons to be awarded back pay. This list shall include:

(a) Each of the persons whose name is placed on the hiring list pursuant to B(1)(a) or (b).

(b) If fewer than 102 persons qualify under subparagraph (a) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons who applied to take either the 1971 or 1975 exam whose names are not placed on the hiring list pursuant to B(1)(a) but who prove to the special master, by a preponderance of the evidence, that on the date of the exam for which they applied, they

(i) were eighteen years of age,

(ii) had graduated from high school or earned a high school equivalency certification,

(iii) possessed a valid Connecticut driver's license.

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraph (a) of this paragraph, the special master shall notify each of the individuals potentially eligible for back pay under this subparagraph that they may file applications for back pay awards, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(c) If fewer than 102 individuals qualify under subparagraphs (a) and (b) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons whose names are not placed on the hiring list pursuant to B(1)(b) but who prove to the special master by a preponderance of the evidence that but for the defendants' discriminatory practices they would have applied to take either the 1971 or 1975 exam, and that on the date of the exam for which they would have applied they

(i) were eighteen years of age,

(ii) had graduated from high school, or earned a high school equivalency certification,

(iii) possessed a valid Connecticut driver's license,

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraphs (a) and (b) of this paragraph, the special master, in a manner he deems appropriate, shall publicize the fact that he will be accepting applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(d) If fewer than 102 individuals qualify under subparagraphs (a), (b), & (c) of this paragraph, the remaining places on the back pay list shall remain vacant.

(3) For the purposes of this order, back pay shall include

> (a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are or were entitled under union contracts, including all increments, together with interest and, for those individuals whose names are on the hiring list established pursuant to this order, "front pay" until the date the individual is offered active employment.
>
> (b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

(4) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1971 test shall be awarded back pay from October, 1973 (two years prior to the filing of the first complaint with the EEOC).

(5) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1975 test shall be awarded back pay from October, 1976 (when the first firefighter was hired from the 1975 list).

(6) While considerations of back pay liability may not enter into determining whose names shall be placed on the list, the City may, if it chooses, offer active employment to those on the hiring list in an order that will minimize its liability for "front pay." It would seem to make sense in terms of both economics and social policy for the City to offer active employment first to those with the least present income.

479 F. Supp. at 115-19 (footnotes omitted).

the 1971 and 1975 exams, set immediate minority hiring goals for the City, required the active recruitment of minority firefighters and the hiring of firefighters on a nondiscriminatory basis after the immediate goals were met, and awarded backpay and seniority relief to victims of the City's discrimination.

After reviewing certain of this Court's decisions in employment discrimination cases, the court concluded that the City's long history of egregious race discrimination warranted the issuance of a race-conscious hiring order, and that the court would be shirking its duty were it not to order affirmative relief to remedy past effects of discrimination. The court stated that its own aims were to grant redress to the victims of discrimination, to prevent future discrimination, and to persuade potential minority candidates that future applications for employment in the Bridgeport fire department would not automatically be rejected. The court expressly declined, however, to impose a hiring quota, which it defined as an order requiring the relatively permanent use of a specified hiring ratio. Rather, the court determined to set hiring goals for the City, which would lapse when the specified number of minority offers had been made, concluding that the imposition of such goals was "the only effective means of remedying past discrimination." *Id.* at 114. The court elaborated as follows:

> [T]his Court is of the opinion that merely ordering nondiscriminatory hiring in the future, even coupled with the requirement that the City actively recruit minority candidates, would be inadequate either to remedy past discrimination or "to assure prospective minority candidates that applying is no longer futile." *Association Against Discrimination in Employment* v. *City of Bridgeport, supra*, 594 F.2d at 311 n.13. "The effects of . . . past violation[s] of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." *Rios* v. *Enterprise Association*

> *Steamfitters Local 638*, [501 F.2d 622, 631 (2d Cir. 1974)].[14]
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> [14] In its opinion, this Court indicated that "there appears to be no bad faith on the part of defendants in using the exam or selecting the respected management consulting firm of Hay to develop the exam." 457 F. Supp. at 757. Defendants and defendants-intervenors now argue that the imposition of a hiring order would be inconsistent with this prior finding of good faith. Good faith however, is not a defense to a charge of discrimination based on the use of discriminatory tests. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). And while good faith may be a factor to be considered in fashioning a remedy, the prior finding of good faith did not apply to defendants' lack of recruitment of minority applicants or treatment of individual minority persons.

Id. at 113-14.

In setting the hiring goals for the City, the court looked to the period during which violations had been found and to the ratio between Bridgeport's minorities and nonminorities. On the basis of its ruling that the City's violations of Title VI dated back to January 1, 1971, the court selected the period starting on that date as its time frame. Within that period, the court observed that the City had hired 152 white firefighters, one hispanic firefighter, and three black firefighters. Having noted at the outset of its opinion that black and hispanic persons in 1975 comprised approximately 41% of Bridgeport's labor force, the court observed that "[t]he hiring of an additional 102 minority persons would create a situation in which the percentage of minority firefighters hired since January 1, 1971 roughly would equal the percentage of minority persons in the population of the City." *Id.* at 115 (footnote omitted).[10]

The court therefore ordered the City to compile a list of 102 persons to whom firefighter positions are to be offered.[11] The list is to be comprised, first, of those minority individuals still seeking to be firefighters who filed applications for either the 1971 or 1975 exam and who can pass the City's agility test and medical examination; if there are fewer than 102 such persons, the list is to include minority persons who can prove to a special master that they were deterred by the City's discriminatory practices from applying to take either the 1971 or the 1975 exam, and who can pass the agility test and medical exam; and finally if the total number of applicants and deterred would-be applicants is less than 102, additional minority persons, identified by a method to be devised by the City with the approval of the court, are to be added until the total reaches 102.[12]

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[10] In answer to this Court's question as to the effect of the interim orders permitting the hiring of 84 firefighters from the 1975 test list, the district court found that

> [p]laintiffs agreed not to seek to enjoin defendants from hiring firefighters from the 1975 list, provided that defendants warranted that there was and would remain an immediate need and adequate funding for a number of firefighters equal to the number actually hired pursuant to the agreement.

479 F. Supp. at 105 n.4. It concluded that the defendants did not thereby agree to quota-type relief or concede that any relief would be appropriate, and the plaintiffs did not agree that the City would not be liable for backpay.

[11] Testimony at the hearing had indicated that there were currently 121 vacancies, although not all vacancies could be filled simultaneously.

The order requires the City, as quickly as possible within the limits of its ability to train new firefighters, to offer the 102 persons on the list active employment in the fire department and prohibits it from hiring any other individuals as firefighters until all of the persons on the list have been offered such employment.

In addition, the court ordered the City to compile a list of up to 102 persons to be awarded backpay, comprised first, of persons who were applicants or deterred would-be applicants for the 1971 or 1975 exam whose names are placed on the list of persons to whom employment must be offered; if there are fewer than 102 such persons, the list is to include minority persons who applied to take the 1971 or 1975 test, but whose names are not on the list of persons to be offered positions, providing they prove to the special master by a preponderance of the evidence that they met the City's age, residency, driver's license, education, agility and medical requirements on the date of the exam for which they applied; and finally, if there are fewer than 102 persons in those two groups, the list is to include minority persons not on the list of those to be offered positions, who prove to the special master by a preponderance of the evidence that but for the City's discriminatory practices they would have applied to take either the 1971 or 1975 exam, and that on the date of such exam they met the city's age, residency, driver's license, education, agility and medical requirements. To the extent that all of these groups combined yield fewer than 102 persons, the remainder of the backpay list is to remain vacant. For those who took or were deterred from taking the 1971 exam, backpay was awarded for the period beginning in October 1973, *i.e.*, two years prior to the filing of the first complaint with EEOC; for individuals who took or were deterred from taking the 1975 exam, backpay was awarded for the period beginning in October 1976, the date the first firefighter was hired from the 1975 list.

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[12] The order allowed exclusion of persons who did not meet the City's requirements as to age, residence, education, and possession of driver's license.

In recognition of the seniority loss suffered by the victims of the City's discrimination, the court prohibited the City from giving any promotional examinations to firefighters hired pursuant to the 1971 or 1975 exams until all new minority firefighters who took or were deterred from taking the 1971 or 1975 exams have become qualified to take the promotional examinations. The City was not prohibited from reducing its time-in-grade requirements for promotional exams so as to advance the time at which the new hirees would become eligible, or from filling any promotional vacancies on an "acting or provisional" basis, so long as any such acting or provisional supervisors were not given any preference in the selection of permanent supervisors.[13]

E. Issues on This Appeal

On appeal, defendants do not contest the district court's conclusion that the City is liable for race discrimination under the Revenue Sharing Act dating back to January 1, 1973,[14] nor do they contest the conclusion that the 1975 exam was unlawful under Title VII. They contend, however, with respect to both Title VI and Title VII, that the district court erred in holding the City liable for discrimination prior to 1975. In addition, defendants challenge various aspects of the remedy, arguing that the remedy constitutes an impermissible hiring quota, that the numerical hiring order is overbroad and requires the City to hire unqualified individuals, that the promotional freeze places an undue burden on a small, readily identifiable group of nonminority employees, and that the backpay relief is overinclusive and insufficiently tailored to the alleged violations.

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[13] On October 1, 1979, the district court granted a conditional stay of its judgment pending appeal. The conditions attached to the stay included a provision that "[t]he defendants hire at least two minorities for every white (defendants may hire a total of twenty one persons of whom 14 are minority and 7 are white)." This Court subsequently continued the stay on condition that the City satisfy the conditions set out therein. We are informed that additional hiring of firefighters has in fact taken place.

[14] Defendants purported to appeal from all portions of the district court's "Memorandum of Decision and Order." The City, however, has not asserted any error in the court's holding it liable for violation of the Revenue Sharing Act. BFME, in its brief on this appeal, merely states its unelaborated contention that the Revenue Sharing Act does

The plaintiffs have cross-appealed from two aspects of the relief ordered. They contend that the court erred in placing on the minority candidates the burden of proving that they met the City's nondiscriminatory employment requirements in order to receive backpay, and they contend that the district court should have awarded constructive seniority for job placement, benefits, and other purposes, to persons hired pursuant to the order.

As to liability, we affirm the holding that the City has violated Title VII since 1972, but vacate the district court's ruling that the City violated Title VI. As to remedy, we affirm the district court's general remedial plan, but remand for modification as to the number of minority persons to whom employment must be offered as to various aspects of the backpay and seniority awards.

I. LIABILITY UNDER TITLE VII

We turn first to defendants' contention that the district court erred in finding the City liable for Title VII violations dating back to March 24, 1972, the date on which Title VII became ap-

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not provide a basis for liability in this action; it states that since the district court did not impose a remedy under that statute, BFME does not address it. It should be noted that this Court has recently held that backpay is a remedy available to a successful plaintiff under the Revenue Sharing Act. *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496 (2d Cir. 1980).

plicable to the City. Defendants do not contend here that the 1975 exam or the 1971 exam was job related or that the impact of either exam was not discriminatory. Rather they argue principally that it is not permissible to hold the City liable under Title VII for hiring from an eligibility list based on a pre-Title VII test, and that the Title VII claims based on hiring pursuant to the 1971 exam were not timely filed under § 706 of the Act.[15] Neither contention has merit.

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[15] Defendants make two additional arguments which merit but brief mention. First, they argue that questions of pre-1975 discrimination were never litigated in the district court. This contention is baseless. The complaint's challenge to the City's use of unlawful exams was not limited to the 1975 exam. While the 1971 exam was not mentioned in haec verba, several of the allegations related to that exam rather than the 1975 exam. The defendants, in turn, asserted a two-year statute of limitations with respect to acts occurring more than two years prior to July 1976. In pretrial discovery, plaintiffs asked numerous questions about the City's practices dating back to 1965, with interrogatories, for example, asking a breakdown of test applications, by race, for each year from 1965 to 1975. At trial, plaintiffs' first post-pedigree question to their first witness asked about his taking the 1971 exam. Defendants' immediate objection was followed by colloquy in which plaintiffs point out *inter alia*, that post-Title VII hiring had occurred pursuant to the 1971 test. The court overruled defendants' objection and thereafter a considerable amount of evidence was received with respect to (a) the nature of the firefighter exams given in 1965, 1968,and 1971; (b) the pass rates of minority and nonminority persons who took these exams; (c) the fact that the City made no attempt to validate any of its exams prior to 1972; and (d) various other aspects of the City's "'long continued'" history of discrimination.

In addition we reject defendants' contention that the doctrine of laches bars relief for the pre-1975 hirings. Assuming, without deciding, that the doctrine applies in Title VII cases, *see, e.g., Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 373 (1977); *Albermarle Paper Co.* v. *Moody, supra*, 422 U.S. at 424-25; *Boone* v. *Mechanical Specialties Co.*, 609 F.2d 956, 958-59 (9th Cir. 1979); *Bernard* v. *Gulf Oil, Inc.*, 596 F.2d 1249, 1256-58 (5th Cir.), *rehearing en banc granted*, 604 F.2d 449 (5th Cir. 1979), *aff'd in relevant part on*

A. Liability for Post-Title VII Hiring Based on the 1971 Exam

Defendants contend that the City cannot be held liable for any hiring pursuant to the list generated by its 1971 firefighters exam because that exam predated the applicability of Title VII to the City, and because its hiring from the 1971 exam was therefore pursuant to a "bona fide merit system," which is made lawful by § 703(h) of the Act. Neither precedent nor reason supports these contentions.

Section 703(a) of the Act makes unlawful an employer's failure or refusal to hire an individual on the basis of race. When it was enacted in 1964, this provision did not apply to municipalities. The provision became applicable to the City on March 24, 1972, by the passage of Pub. L. 92-261, § 2(1), 86 Stat. 103, which simply broadened the definitional provisions so as to make Title VII applicable to municipalities and certain other entities not previously covered. Nothing in the broadened definition suggested that a continued application of past discriminatory standards was permissible; clearly the intention was to the contrary. Thus, in *Guardians Association* v. *Civil Service Commision*, 633 F.2d 232 (2d Cir. 1980) (*"Guardians III"*),[16] we categorically rejected the notion that a municipal employer who held a discriminatory exam prior to March 24, 1972, could lawfully continue after that date to invoke the results of the discriminatory exam to make employment ap-

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rehearing en banc, 619 F.2d 459 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3428 (U.S. Dec. 8, 1980), we note that defendants did not assert this defense in the district court, and that they have failed in this Court to make any showing of substantial prejudice such as is ordinarily necessary to invoke such a defense.

[16] The *Guardians* litigation had resulted in two prior appeals to this Court, reported at 490 F.2d 400 (2d Cir. 1973) (affirming denial of preliminary injunction), and at 562 F.2d 38 (2d Cir. 1977) (mem.) (vacating preliminary injunction and remanding for reconsideration in light of *Internatinal Brotherhood of Teamsters* v. *United States, supra*).

pointments. We observed that to conclude otherwise would permit an employer, "with impunity, [to] refuse to hire in a timely manner hundreds of minority applicants, solely because of performance on an invalid test, years after Title VII explicitly forbade the *use* of testing results to discriminated in hiring." *Id.* at 252 (emphasis in original.

Nor does § 703(h) of the Act legitimate defendants' post-Title VII hiring. That section provides in pertinent part as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test *provided that such test*, its administration *or action upon the results is not* designed, intended or *used to discriminate* because of race, color, religion, sex or national origin.

42 U.S.C. §2000e-2(h) (emphasis added). The City seeks to characterize its 1971 exam as a "bona fide...merit system," in order to perpetuate its ability to use that test's results without violating Title VII. The district court, however, found that the 1971 exam was not job related and that it had a discriminitory impact—findings that defendants do not challenge on this appeal. Thus, bypassing the question whether the term "merit system" even applies to hiring decisions, as contrasted with post-hiring decisions, *see Guardians III, supra*, 633 F2d at 251-52, we reject the City's attempt to immunize its post-Act hiring by reference to § 703(h) for two reasons. First, since the

1971 test was "used" to discriminate against minorities, it is expressly excluded from § 703(h). More fundamentally, it would defy reason to characterize as a "bona fide merit system" a test that does not measure the fitness of those who take it for the positions to be filled according to its results. *See id.* at 252 ("[A] hiring system that ranks applicants according to their performance on discriminatory examinations cannot claim the stauts of a "bona fide merit system" within the meaning of the statute.") Thus, defendants' argument, like that of the defendants in Guardians III, is not supported by the decision of the Supreme Court in *International Brotherhood of Teamsters* v. *United States:*

> Unlike the seniority system in *Teamsters*, the merit system in the instant case does not measure what it purports to measure. The failing of the department's hiring system is therefore not that it perpetuates *the effects* of past discrimination, but rather that it perpetuates discrimination. It is one thing to utilize a system that locks in the effects of past discriminatory hiring decisions; it is a very different thing to lock in a discriminatory hiring decisions; it is a very different thing to lock in a discriminatory method of making hiring decisions... Nothing in *Teamsters* implies that by labelling a non-job-related system of employee selection a 'merit' system, an employer can avoid the command of Title VII that it henceforth select its workforce in a non-discriminatory fashion.

Guardians III, supra, 633 F.2d at 253 (emphasis in original).

Accordingly, we conclude that the City could be held liable under Title VII for its post-Act appointments based on the 1971 test.

B. The 300-Day Limitation

Defendants' other principal challenge to the district court's ruling under Title VII is based on the statute of limitations established by § 706(e) of the Act. That section provides that in order to maintain a suit under Title VII, a plaintiff must have filed a charge of discrimination with EEOC within 300 days of the alleged discriminatory act.[17] 42 U.S.C. § 2000e-5(e) (1976). *See, e.g., United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977); *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977). The City's last hirings based on the 1971 exam occurred on May 2, 1973, and there were no further hirings until after 1975. Plaintiffs' first EEOC charge pertaining to defendants' hiring practices was filed in October 1975. Defendants argue, therefore, that insofar as plaintiffs' claims relate to the 1973 and earlier hirings, they are barred by the 300-day period of limitations. This contention takes an impermissibly myopic view of the nature of the City's unlawful conduct.

As a general matter, the mere continuation of a discriminatory act's effects, when the act itself occurred prior to the pertinent limitations period, is not sufficient to support recovery under Title VII. *United Air Lines, Inc.* v. *Evans, supra*, 431 U.S. at 558. *See also Delaware State College* v. *Ricks*, 101 S. Ct. 498 (1980). The act that constitutes the violation must be "still fresh" within the statutory period. *Egelston* v. *State University College*, 535 F.2d 752, 755 (2d Cir. 1976). Thus, had the 1971 exam and the hiring on the basis of that exam been isolated acts of discrimination, defendants' statute of limitations argument would be well taken, even though the effects of that past discrimination were still being felt by reason of the resulting racial makeup of the fire department.

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[17] If the complaintant had not "initially instituted" proceedings before a statute antidiscrimination agency, the applicable limitations period is 180 days. 42 U.S.C. § 2000e-5(e) (1976). Defendants have not challenged the applicability of the 300 day period.

Where, however, the defendant has engaged in a continuous policy of discrimination, acts in furtherance of that policy are not viewed in isolation. In such circumstances if the charge has been filed no later than 300 days after the *last* act by the defendant pursuant to its policy, the plaintiff may recover for earlier acts of discrimination as well. *See Guardians III, supra*, 633 F.2d at 249; *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *see also Smith* v. *American President Lines, Ltd.*, 571 F.2d 102 (2d *Cir. 1978)*. In *Acha* v. *Beame*, we stated this principle as follows:

> To succeed at trial, the appellants must be able to demonstrate a Title VII violation and within the period of the statute of limitations, or 300 day charge-filing period. But such a violation is not limited to hiring violations per se.
>
> A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy... Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate.

570 F.2d at 65 (emphasis in original; citations omitted).

There can be no doubt that the continuous-policy principle governs the present case. The district court made express findings as to several discriminatory acts by the City that occurred within 300 days of October 1975. These included the giving of the 1975 exam that was not job related and had discriminatory impact, and the individual acts of discrimination against several minority candidates who sought to take that exam in 1975. In addition, the court found that the City had "engaged in a continuing pattern and practice of post-Title VII discrimination...against black and hispanic persons," *id.* at 111-12; and that it had "engaged in a 'clear-cut pattern of long-continued and egregious racial discrimination,'" *id.* at

112. The court concluded as follows: "This Court also finds that the discrimination has been 'long-continued' whether one examines the entire history of the City's hiring of firefighters or only its post-Act conduct." *Id.* at 113.

In light of these findings, which are not clearly erroneous, the City's 1975 discriminatory acts cannot be divorced from its earlier acts or its overall history. We conclude that all of plaintiffs' Title VII claims are timely, and we affirm the ruling of the district court that the City violated Title VII from March 24, 1972, by making appointments after that date that had discriminatory impact, based on its discriminatory 1971 test.

IV. LIABILITY UNDER TITLE VI

The City has made essentially a threefold challenge to the district court's finding of liability under Title VI. It contends that is never had notice of, or an opportunity to litigate, the Title VI issues in the district court, that such claims are barred by the applicable statute of limitations or by laches, and that in any event, plaintiffs failed to prove a violation of that Title. Since we find merit in the last of these contentions we need not deal with the issue of timeliness, and we touch on the notice contention only in order to place in perspective the failure of proof.

The complaint filed by plaintiff clearly raised issues under Title VI. Paragraph 6(b) stated as follows:

> Bridgeport has received in the past and will receive in the future federal financial assistance including revenue sharing funds. It has spent a portion of these funds and intends to continue to spend a portion of- such funds received in the future in the area of public safety, including the Fire Department.

And paragraph 17 alleged:

> Defendant's [*sic*] discriminatory practices violate the plaintiffs' rights not to be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance, on account of race, color, or national origin, guaranteed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d.

The City admitted the allegations of paragraph 6(b), and denied paragraph 17.

Much of the evidence presented by plaintiffs at trial related to the City's discriminatory practices between 1964, when Title VI took effect, and 1972 when Title VII became applicable to municipalities. For example, the record included the firefighters examinations given in 1965, 1968 and 1971, with data as to the numbers of minority and nonminority applicants who took and who passed those exams. This evidence was relevant not only as background for the Title VII claim, but also as proof of the Title VI claim. The latter relevance does not seem to have been entirely lost on the defendants; the City's posttrial memorandum began with the statement that the plaintiffs asserted claims under both Title VII and Title VI. We conclude that the defendants had more than adequate notice and opportunity to contest the Title VI claims at the initial trial in this case, and that the district court was entitled to consider these claims after the remand from this Court.[18]

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[18] Our prior opinion neither explicitly required nor forbade consideration of Title VI. Rather, our request that the district court clarify the theories on which any pre-1972 liability was found implicitly permitted the consideration on remand of any available theory.

As the record stands, however, we do not find that plaintiffs proved all of the elements of their Title VI claim.[19] Title VI, § 601 of the Civil Rights Act, states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1976). Section 602 of the Act imposes on agencies "empowered to extend Federal financial assistance to any program or activity" a duty to effectuate the provisions of the Title by issuing appropriate rules and regulations. 42 U.S.C. § 2000d-1. The enforcement power of the agencies under § 602, however, is limited by § 604 as follows:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide emloyment.

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[19] The recent decisions in this Circuit have generally assumed the existence of a private right of action under Title VI. *See, e.g., Guardians III, supra,* 633 F.2d at 270-71 (Kelleher, D.J., concurring); *id.* at 274 (Coffrin, D.J., concurring); *Bryan* v. *Koch*, 627 F.2d 612 (2d Cir. 1980); *Lora* v. *Board of Education*, 623 F.2d 248 (2d Cir. 1980). Although the Supreme Court has not squarely held that a private right of action exists under Title VI, its recent decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), supports our view. There the Court in deciding that a private right of action existed under Title IX, relied in part on its conclusion that Congress, when it drafted Title IX, used Title VI as a model and believed that Title VI provided a private right of action.

42 U.S.C. § 2000d-3. This section in effect requires a logical nexus between the use of federal funds and the practice toward which agency action is directed. Although on its face § 604 limits the circumstances under which can be taken by an agency, plaintiffs have not argued that the provision is applicable only to agencies and not to private actions. Both plaintiffs' brief and the amicus brief of the government appear to assume that the "primary objective... to provide employment" limitation applies to private rights of action as well. We agree. We see no indication that Congress would not have intended that the logical nexus requirement exist with respect to private actions as well as agency action. Thus, for a claimant to recover under Title VI against an employer for discriminatory employment practices, a threshold requirement is that the employer be the recipient of federal funds aimed primarily at providing employment. *See Carmi* v. *Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 674-75 (8th Cir.), *cert. denied*, 101 S. Ct. 249 (1980); *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

The district court's findings with respect to Title VI did not touch on this requirement. The Court stated simply as follows:

> Defendants, in their answer, have admitted that federal funds have been received by the City and expended in the Fire Department. Plaintiffs have proven that such funds were received and expended in the Fire Department in each year between 1971 and 1977.

479 F. Supp. at 111. There was no finding that the funds were aimed primarily at providing employment. Thus, the findings do not adequately support the ruling on liability.

Nor would a finding as to the primary purpose of the federal funds have been supported by the properly received evidence of record. The complaint contained no express allegation as to the primary purpose of such funds, and hence there was no pleaded admission as to this element. Further, it appears that no evidence as to the purpose of the federal funds was introduced at the earlier stages of this case. Prior to the evidentiary hearing on remand, plaintiffs apparently recognized that the record was deficient in this respect, stating as follows:

> The record is not clear with respect to the relevance of Title VI to this case, in that there is no evidence relating to receipt of federal funds by the City other than Revenue Sharing funds.

Plaintiffs therefore requested that the court accept evidence relating to Title VI at the hearing on remand. The district court, however, denied plaintiff's request. Its prehearing order limited the permissible evidence to other issues, and when plaintiffs nevertheless sought at the hearing to elicit testimony from the City's Comptroller on the subject of the City's use of federal funds, the court sustained the City's objection and dismissed the witness. The plaintiffs do not challenge this exclusion by the district court; to the contrary, they properly concede that "the scope of additional evidence, if any, was within the trial judge's discretion, which he did not abuse." (Appellees' Brief on Appeal at 21.)

Plaintiffs contend, however, that the record adequately reflects the use of federal funds under the Emergency Employment Act[20] for the purpose of employment in the City's fire department, because the district court stated that it would take judicial notice of the City's budget. While we reject the City's contention that the district court could not properly take judicial notice of the budget, we cannot see that any materials properly the subject of judicial notice provided the information that was required. Rule 201(b) of the Federal Rules of Evidence allows a court to take judicial notice of a fact that is not subject to reasonable dispute because it is either:

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[20] Plaintiffs' reference was to Pub. L. 92-54, § 2, 85 Stat. 147 (1971), which states that "[i]t is...the purpose of this Act to provide unemployed and underemployed persons with transitional employment in jobs providing needed public services during times of high unemployment..."

> (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

A municipality's published budget could qualify as a source of information whose accuracy cannot reasonably be questioned. What was presented to the court here, however, was a few photocopied pages of the City's "Public Employment Employee Roster," which did not readily reveal the primary purpose of federal funds received by the City. These pages merely listed names and addresses of individuals, together, apparently, with various City departments, and dates, and an assortment of other numbers that we find altogether cryptic. Nowhere on any of the photocopied pages is there any mention of the Emergency Employment Act, or any other indication that what is there reflected is federal funding primarily for employment.

The characterization of these pages as reflecting the receipt of federal funds for employment purposes comes strictly from the affidavit to which they were attached. This affidavit, submitted by a paralegal employed by plaintiffs' cousel, stated in pertinent part as follows:

> IV. My examination revealed that indeed, at least during the years 1971 and 1972, some federal money was used by the City to hire personnel for the Fire Department. This money was provided to the City through the Emergency Employment Act of 1971.
>
> V. The hiring of Fire Department personnel with Emergency Employment Act money was recorded in the "Public Employment Roster" for the years 1971 and 1972. Photo copies of relevant pages of this

> roster along with my own added notations are attached.

Such an affidavit, of course, is not a source whose accuracy is beyond reasonable question, and the facts recited therein could not properly have been judicially noticed.[21]

We conclude that the affidavit could not, and the photocopies *did* not, supply the evidence required to support plaintiffs' Title VI claim. We therefore vacate the court's ruling that the City violated Title VI.

V. THE REMEDIAL ORDER

The district court's remedial order grants what may be viewed as three classes of relief: (1) compliance relief, *i.e.*, that designed to assure future compliance with Title VII; (2) affirmative relief, or that designed to remedy the effects of past discrimination; and (3) compensatory relief, that which is designed to "make whole" the victims of past discrimination. The last two categories may overlap to some extent, although their intended functions differ. The first two categories differ principally as follows:

> Compliance involves restricting the use of an invalid exam, specifying procedures and standards for a new valid selection procedure, and authorizing interim hiring that does not have a disparate racial impact. Affirmative relief involves interim hiring at any ratio greater than what is necessary just to avoid a disparate racial impact and any required long-term hiring targets or ratios.

Guardians Ass'n v. *Civil Service Comm'n*, 630 F.2d 79, 108 (2d Cir. 1980) (*"Guardians IV"*) (footnotes omitted).

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[21] It does not appear that the court relied in any way on the affidavit, since it made no finding as to the purpose of the City's receipt of federal funds.

The principal element of compliance relief granted by the district court is the injunction against any further use of the 1971 and 1975 written exams. In addition, following the City's compliance with the immediate affirmative relief granted, the City is ordered actively to recruit minority persons to compete or firefighter positions and to hire on a nondiscriminatory basis. These portions of the order are not challenged by the defendants.

The principal affirmative relief provided by the order is the requirement that the City compile a list of 102 minority candidates to whom firefighter positions must be offered before anyone else may be hired. This requirement provides compensatory relief as well, since priority is given, in the compilation of the list, to actual victims of the City's discrimination. Additional compensatory relief is given in the form of a suspension of promotional examinations until all the new minority firefighters who were victims of the City's discrimination become eligible to take them, and the awarding of backpay up to 102 persons who were victims of the City's discrimination. The defendants attack all phases of the provisions granting affirmative and compensatory relief. The plaintiffs challenge limited aspects of the district court's order with respect to seniority and backpay.

The primary purposes of Title VII are to prevent discrimination and achieve equal employment opportunity in the future, *see International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 364; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975); *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429-30, and to make whole the victims of past discrimination, *see, e.g., International Brotherhood of Teamsters* v. *United States, supra; Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 418. Our evaluation of the district court's order must begin with the recognition that "[o]nce a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, *supra*, 501 F.2d at 629. *See also EEOC* v. *Local 638*, 565 F.2d 31, 34 (2d Cir. 1977); *Vulcan Society of the New York City Fire Dep't, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 399 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975). Our function is not to exercise our own discretion, but to determine, in light of the purposes of the Act, whether the district court judge has abused his. *Cf. Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 421-22.

Because we have vacated the district court's ruling that the City violated Title VI, we find that the number of persons to whom positions must be offered and to whom backpay must be paid should be reduced. In addition, we find that certain aspects of the seniority and backpay awards should be modified. In all other respects, however, we conclude that the remedial order was a proper exercise of the district court's discretion.

A. The Propriety of Affirmative Relief

Defendants' attack on the nature of the affirmative relief, as distinct from the size of the list, asserts principally that the order imposes a quota in violation of § 703(j) of the Act and that it impermissibly discriminates against nonminority individuals. Analysis of the order, however, reveals that the court has not imposed a quota; and the record in this case persuades us that the type of relief ordered is fully justified.

Despite the considerable deference to which a district court's remedial design is entitled, this Court has subjected numerical hiring orders to particularly close scrutiny. As we noted in the prior appeal in this case, cases involving hiring quotas "have been the occasion for some strong differences of opinion" among members of this Court. *ADE* v. *Bridgeport, supra*, 594 F.2d at 310. *Compate Fullilove* v. *Kreps*, 584 F.2d 600, 606-7 (2d Cir. 1978), *aff'd sub nom. Fullilove* v. *Klutznik*, 100 S. Ct. 2758 (1980); *Chance* v. *Board of Examiners*, 534 F.2d 993, 1002-03 (2d Cir. 1976) (Oakes, J. dissenting), *cert. denied*, 431

U.S. 965 (1977); *Kirkland* v. *New York State Dep't of Correctional Services*, 531 F.2d 5, 8 (2d Cir. 1975) (Mansfield, J., dissenting from denial of rehearing en banc); and *Patterson* v. *Newspaper & Mail Deliverers' Union*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976), *with Chance* v. *Board of Examiners, supra* (majority opinion); *Patterson* v. *Newspaper & Mail Deliverers' Union, supra*, 514 F.2d at 776 (Feinberg, J., concurring); *Rios* v. *Enterprises Ass'n Steamfitters Local 638, supra*, 501 F.2d at 634-39 (Hays, J., dissenting). The Supreme Court's recent opinions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) and *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), provide no clear guidance as to how these differences should be resolved. *Bakke*, which revealed "strong differences of opinion" in the Supreme Court as well, did not involve a temporary quota or goal imposed as a specific remedy to an adjudicated violation of Title VII. *Cf.* 438 U.S. at 300-02 (opinion of Powell, J.); *see also Fullilove* v. *Klutznik, supra*, 100 S. Ct. at 2784-85 (Powell, J., concurring). And in *Weber*, which involved an affirmative action plan that a private employer had adopted voluntarily, the Court specifically excluded from the scope of its inquiry "what Title VII requires or . . . what a court might order to remedy a past proved violation of the [Civil Rights] Act." 443 U.S. at 200.

Despite the differences of opinion in the Supreme Court and in our own Court, several guiding principles emerge from the cases. First, since a primary purpose of Title VII is to make whole the past victims of discrimination, "[i]nitial consideration should be given to relief for the plaintiffs and those similarly situated," that is, to identifiable victims of the employer's discriminatory actions. *Guardians IV, supra*, 630 F.2d at 108. Section 706(g) of the Act makes it clear that such make-whole relief may include an order requiring the hiring of past discriminatees. 42 U.S.C. § 2000e-5(g).[22] In addition, the court may seek to eradicate the discriminatory effects of proven Title VII violations, *see, e.g., Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 633 ("elimination of discriminatory effects...is permissible"), by eliminating the disparate impact of a discriminatory exam. *See Guardians IV, supra*, 630 F.2d at 108.

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[22] Section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of [section 704(a) of the Act].

The requirement that an employer have discriminated "intentionally" in order for the provisions of § 706(g) to come into play means not that there must have been a discriminatory purpose, but only that the acts must have been deliberate, not accidental. *See Williams* v. *General Foods Corp.*, 492 F.2d 399, 406-07 (7th Cir. 1974), and cases cited therein. *See also Franks* v. *Bowman Transp. Co., supra*, 424 U.S. at 762-66, 770-71; *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 422-23.

Second, the remedy for a proven violation of anti-discrimination laws need not be "color-blind" but "may in the appropriate case include a racial or ethnic factor." *Fullilove* v. *Klutznick, supra*, 100 S. Ct. at 2777 (opinion of Burger, C.J.). Section 706(g) specifically provides that upon finding a violation a court may "order such affirmative action as may be appropriate," 42 U.S.C. § 2000e-5(g), and § 703(j) of the Act does not bar race-conscious relief. That section provides, in pertinent part, as follows:

> Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group...on account of an imbalance which may exist with respect to the total number or percentage of persons of such race...in comparison with the total number or percentage of persons of such race...in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j). As this Court has stated many times, what § 703(j) proscribes is racial preference where racial imbalance is not related to discrimination; but it does not proscribe imposition of a racial goal as an exercise of remedial authority under § 706(g) to correct an imbalance that has resulted from discrimination. *See, e.g., EEOC* v. *Local 638, supra*, 532 F. 2d at 827-28; *Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 630-31; *United States* v. *Wood, Wire and Metal Lathers Int'l Union, Local 46, 471 F.2d 408, 412-13 (2d Cir.), cert. denied*, 412 U.S. 939 (1973). And while some members of this Court have expressed reservations as to the proper interpretation of § 703(j), *see e.g., EEOC* v. *Local 638, supra*, 532 F.2d at 834 (Feinberg, J., concurring); *Rios* v *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 636-37 (Hays, J., dissenting), they have not, to our knowledge,

suggested that it bars a provision that not only gives affirmative relief but simultaneously awards compensatory relief by requiring the hiring of the identifiable victims of discriminatory employment practices.

Balanced against the broad equitable power to remedy Title VII violations is a recognition that "the use of . . . [racial] goals means, in practice, that certain nonminority persons will be kept out . . . solely on account of their race or ethnic background" and that this impinges on the basic principle "that individuals are to be judged as individuals, not as members of particular racial groups." *EEOC* v. *Local 638, supra*, 532 F.2d at 827. Accordingly, several members of this Court have stressed that quotas or goals must be approached only with reluctance, or at least in a "gingerly" fashion. *See, e.g., Kirkland* v. *New York State Dep't of Correctional Services*, 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *EEOC* v. *Local 638, supra; Vulcan Society, supra*, 490 F.2d at 398-99. In *Kirkland*, it was suggested that racial quotas are appropriate only when there has been "a clear-cut pattern of long-continued and egregious racial discrimination" and the reverse discriminatory effects are not felt by "a small number of readily identifiable" individuals. 520 F.2d at 427, 429. *See also EEOC* v. *Local 638, supra*, 532 F.2d at 827-28.

Yet the mere possibility that a race-conscious remedy may have an adverse impact on nonminority individuals does not render that remedy impermissible. In the context of seniority relief, for example, the Supreme Court has warned that the denial of relief

> to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII.

Franks v. *Bowman Transp. Co., supra*, 424 U.S. at 774. *See also Kirkland* v. *New York State Dep't of Correctional Services, supra*, 531 F.2d at 8 (Mansfield, jr., dissenting from denial of rehearing en banc).

Turning to the record in the present case, we are persuaded that the type of affirmative relief ordered here — *i.e.*, that 102 minority candidates, to be identified, be offered firefighter positions before anyone else may be hired — fits comfortably within the foregoing framework. The order gives primary consideration to actual victims of the City's past discrimination and was carefully tailored to fit the violations found. The City's tests, policies and practices unlawfully discriminated against minority candidates who applied; its discriminatory policies and practices unlawfully deterred other minority candidates from applying.[23]

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[23] Those who can prove they were deterred from applying for employment by an employer's discriminatory practices are actual victims of discrimination and are entitled to the same restitution as minority applicants. *See International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 364-66 The Court stated:

> The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by

The court's order reqires that the first persons to be placed on the list be minority candidates who applied to take the 1971 or 1975 exam and who were not offered, but still seek, employment in the fire department.[24] The next persons to be included are minority candidates who were unlawfully deterred from applying. to this extent the affirmative relief ordered by the district court seeks not only to remedy the effects of past discrimination but to further the "make whole" purpose which is central to the statutory scheme.

At this stage, of course, it cannot be known whether the total number of minority candidates who failed the exam or were deterred from applying is greater or less than the number of places on the required offering list. If the total exceeds the number of places, the affirmative relief ordered by the court will

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> the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded minority groups.

Id. at 365 (footnote omitted). Here, the district court found that the City had actively deterred interested minority candidates, a finding that is not clearly erroneous. Indeed, defendants merely content themselves with characterizing this finding as "dubious." Even were dubiety the standard, it would not be met in the face of the present record.

[24] We find no merit in defendants' contention that the order will require the City to hire persons who are not qualified to be firefighters. All will be required to pass physical fitness test, and meet the City's other requirements, other than the written test. As to the written test, its omission cannot be detrimental to the City. The district court found—and defendants do not here dispute—that these exams were not job related. Indeed, the Bridgeport Fire Chief testified that the 1975 exam might well rank lowest those candidates who would be the best firefighters. on the record in this case, therefore, it cannot be said that the minority applicants who failed the firefighters exams are any less qualified than the nonminority individuals who passed.

have been only compensatory[25] — requiring offers only to identifiable victims of past discrimination — and should thus pass muster even with members of this Court who are reluctant to impose quotas or goals. *See, e.g., EEOC* v. *Local 638, supra,* 532 F.2d at 834 (Feinberg, J., concurring) ("Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminately denied jobs, can accomplish much without resort to quotas."); *Kirkland* v. *New York State Dep't of Correctional Services, supra,* 520 F.2d at 429 (Van Graafeiland, J., joined by Timbers and Hays, JJ.) ("We must address ourselves to individual rights.").

To the extent that the number of discriminatees who still seek firefighter jobs is less than the number of places on the list, the district court's order requires the City to devise a method for identifying additional minority persons to fill out the list. To this extent the affirmative relief would be more extensive than the compensatory relief and would be directed solely toward alleviating the effects of the City's past discrimination. It is this aspect of the order — *i.e.*, the contingent requirement of a minority offering in excess of the number of identifiable, still interested discriminatees — that must be examined in light of the principles applicable to racial goals. Several factors persuade us that the nature of the court's noncompensatory efforts to eliminate the effects of the past discrimination do not offend Title VII or the Constitution.

Preliminarily we observe that the relief ordered was neither intended to be, nor is it, a quota. In *Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra,* a majority of the panel offered the following distinction between hiring quotas and hiring goals:

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[25] Indeed, in these circumstances the order will have left uncompensated any additional actual victims of the City's discrimination, for as to any excess number the City is not required to offer firefighter positions or pay backpay.

> [While to some the two words may be synonymous, the term "quota" implies a permanence not associated with "goal." For our purposes the significance of the distinction lies in the fact that once a prescribed goal is achieved the Union will not be obligated to maintain it, provided, of course, the Union does not engage in discriminatory conduct.

501 F.2d at 628 n.3. *See also Kirkland* v. *New York State Dep't of Correctional Services, supra*, 520 F.2d at 429-30. With this distinction in mind, Judge Daly stated that he would "impose a hiring goal," and that he "specifically decline[d] to impose a hiring quota." 479 F. Suppl at 114. We agree that the order does not impose a quota. The affirmative requirement as to hiring does not permanently intrude into the City's hiring process. There are 121 vacancies in the fire department. The order requires the City to make its next 102[26] offers to the minority candidates whose names are placed on the list to be compiled. Thereafter no numerical requirements whatever are imposed on the City, either as to the remaining vacancies or future vacancies: the City is required actively to recruit minority candidates to compete for vacancies in the fire department; and it is required to hire on a nondiscriminatory basis; but no permanent numerical requirements are established.

Further, we note that the court's order is properly viewed as setting hiring "goals" because it may well be that not all the 102 minority candidates to be offered positions will actually accept the City's offers.[27] The City has represented that it cannot train new firefighters at a rate faster than 20 every three to six months. If the list contained as many as 102 names, a period of more than two years could elapse before the last canididates on the list received offers. If as few as 73 names are placed on the list, it appears that at least a year would elapse before the last persons on the list received offers. It is entirely possible that some of the candidates whose names are not near the top of the list will eventually decline to accept appointment to the fire department because of a change in interest or in circumstances during the one to two year interim period. Thus, although the order requires that the next 102 offers be made to minority candidates, it does not mean that minority candidates will be the next 102 persons hired.

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[26] Although in Part B, *infra*, we conclude that the number 102 should be reduced, we use it here for convenience.

[27] All of the pertinent provisions of the order require that a list of 102 minority persons be compiled and that those persons be offered positions. See ¶¶ B(1), 2(c), 479 F. Supp. at 115-17. If any of those persons declines the City's offer, there is no requirement that the City find a minority replacement whom it must actually hire.

Nor does the fact that no nonminority persons will be offered firefighter positions until the City has offered such positions to the persons on the required list mean that the order imposes 100% hiring goals (or, as defendants characterize it, a "100% quota"). The present order must be read in conjunction with the court's interim hiring orders of 1976 and 1977. Those interim orders, which permitted the hiring of 84 firefighters from the 1975 list, expressly provided that those 84 appointments would be counted "as part of" any subsequent court-ordered hiring plan. Thus although the 1979 hiring order is, on its face, limited to minority appointments, 81 nonminority appointments have already been made as part of the hiring plan. As a result of our modification of the size of the offering list, *see Part B, infra*, the court's order will in fact result in minority appointments to fewer than 50% of the firefighter positions filled since 1975

Moreover, the order does not require the City to achieve a specified racial balance in the fire department; rather the number of minority candidates to whom firefighter positions must be offered is measured against the number of firefighters hired since the first adjudicated discriminatory act. In this respect, the scope of the remedy is more limited than other hiring goals previously approved by this Court (and, indeed, more limited than the initial remedial order in this case — see Part I.C. *supra*). In *Rios* v. *Enterprise Ass'n Steamfitters Local 638,* *supra*, and *EEOC* v. *Local 638, supra*, for example, the challenged orders required the defendant unions to achieve certain goals of overall minority membership. In *Vulcan Society of the New York City Fire Dep't* v. *Civil Service Comm'n, supra*, 490 F.2d at 399, this Court approved a hiring ratio that was "midway between what would have been appropriate on the basis of correcting the inequities" of the challenged exam and "the plaintiffs' demands for much more extensive relief." By focusing solely on appointments during the period of proven civil rights violations rather than on overall membership in the fire department, the order here clearly seeks to "correct past discriminatory practices," rather than to "attain racial balance," *United States* v. *Wood, Wire & Metal Lathers Int'l Union, Local 46, supra*, 471 F.2d at 413, thereby avoiding any possible conflict with § 703(j).

Nor do we see that any adverse effects of the establishment of the required offering list will "fall upon 'a small number of readily identifiable' nonminority persons." *ADE* v. *City of Bridgeport, supra*, 594 F.2d at 310, quoting *Kirkland* v. *New York State Dep't of Correctional Services, supra*, 520 F.2d at 429. Those applicants who were hired pursuant to the two interim hiring orders will retain their jobs. Although other nonminority applicants who were placed on the City's appointment list pursuant to the 1975 exam will not be offered positions as early as, or may be passed over in favor of, lower-ranked minority applicants, and possibly in favor of minority persons who did not apply for positions as firefighters, this result will not defeat the nonminority applicants' legitimate expectations. The only source of their expectations was the 1975 exam; and that exam was illegal. And since the mere fact of application to take the exam could not have given rise to any very credible expectation of actual employment, nonminority applicants will not be unduly burdened if some minority nonapplicants are hired pursuant to the court's order.

Finally, the hiring goal is amply supported by the district court's conclusion that "the City of Bridgeport has engaged in a 'clear-cut pattern of long-continued and egregious racial discrimination' with regard to hiring in the Bridgeport Fire Department." 479 F. Supp. at 112-13. The court based this conclusion, and the conclusion that it was Bridgeport's policy to discriminate against minorities, on specific findings of fact. These included the findings that, in addition to administering discriminatory exams, the City had purposely failed to recruit minority applicans,[28] had actively deterred interested minority applicants, and had discriminated against several individual minority candidates, and that the City's failure to recruit and its discriminatory treatment of minority individuals were not in good faith. The factual predicates for the court's conclusion of longstanding egregious discrimination are well supported by the evidence and are not challenged on this appeal.

In sum, we conclude that the district court's order requiring the City to compile a list of minority persons, giving priority to those who were victims of the City's discrimination, and to offer firefighter positions to those persons before hiring anyone else, was not an abuse of the court's discretion. We turn now to the question of the appropriateness of court's selection of 102 as the number of offerees.

B. The Numerical Scope of the Order

The district court arrived at 102 as the number of persons to be offered firefighter positions, by reference to two factors. First, having found the City in violation of Title VI dating back to January 1, 1971, the court chose the period beginning on that date as the time frame within which to count the nonminority firefighters who had been hired pursuant to the discriminatory exams. Second, the court ruled that the number of minority persons offered firefighter positions should be approximately 41% of the total number of firefighters hired during the relevant period. We conclude that the time frame must be modified, but that the percentage selected was not an abuse of the court's discretion.

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[28] The deliberate failure to recruit minority applicants is particularly probative of a discriminatory policy where, as here, the minority employment is extremely low. *Cf. International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 365. *See also Grant* v. *Bethlehem Steel Corp.*, 635 F. 2d 1007, 1015 (2d Cir. 1980); *Rogers* v. *Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded mem. on other grounds*, 423 U.S. 809 (1975).

In Part IV above we concluded that the district court's decision must be vacated insofar as it held that the City had violated Title VI. The Title VI violation found by the district court dated back to 1971. The City's violation of the Revenue Sharing Act found by the district court, and not contested here, dates back only to January 1, 1973. The City's violation of Title VII dates back only to March 24, 1972, when Title VII became applicable to the City. Hence, the earliest date on which the City was properly held to have discriminated unlawfully is March 24, 1972, and we conclude that the proper time frame for calculating the required number of minority offerees began in 1972.[29]

The evidence of record reveals that since March 24, 1972, the City has hired a total of 109 nonminority firefighters. Consequently, whatever percentage is appropriate should relate to this figure, not to the 152 nonminority figure that dates back to 1971. If the 41% figure used by the district court is sustainable, the City will be required to offer firefighter positions to 73 minority persons — *i.e.*, the number which, when added to the three minority persons hired within the relevant period, would bring the total minority offerees (76) to approximately 41% of the total (185).

The district court's selection of the 41% figure, however, is somewhat problematical and if the affirmative relief ordered were of a different sort, we might be constrained to request clarification or reconsideration from the district court. Given the actual nature and effect of the order, however, we conclude that the use of this percentage was not an abuse of discretion.

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[29] This ruling does not mean that relief was improperly extended to persons who were discriminated against in relation to the 1971 exam, since hiring on the basis of the results of that exam extended well into the period for which liability was properly found.

The question arises initialy from the ambiguity of the court's characterization of the 41% figure. The figure was described at the outset of the opinion as the percentage of minorities in the "labor force" in Bridgeport, *see* 479 F. Supp. at 105, and later as the percentage of minority individuals in Bridgeport's "population", *see id.* at 115.[30] *See also* 454 F. Supp. at 757. Plaintiffs argue that the 41% figure does represent the 1975 percentage of minorities in the labor force, and that the City judicially admitted this fact. In fact the City did admit the components of this,[31] and it never asked the district court to relieve

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[30] In the first appeal in this case, our Court referred to the 41% figure as the percentage of minorities in the labor force, *see ADE* v. *City of Bridgeport, supra,* 594 F.2d at 308, but also quoted the district court's statement that minorities constituted 41% of the population, *see id.*

[31] Pursuant to Fed. R. Civ. P. 36, plaintiffs had asked the City to admit the following:

> With respect to the "Affirmative Action Program, City of Bridgeport", published in March, 1976, herein marked Exhibit B:
>
> 14. Exhibit B is a true copy of the Affirmative Action Program prepared by the "Office of contract Compliance" of the city of Bridgeport.
>
> 15. On Page 26 is sta[illegible] that "all data within this Program is based upon statistics as of October 1975."
>
> 16. On page 98 appears a table entitled "Characteristics of Labor Force Within the City of Bridgeport Proper."
>
> 17. The figures on the table on page 98 are accurate records of employment statistics by race and sex within the city of Bridgeport proper and are relevant

it of its admission, although on the remand after the first appeal to this Court it attempted to introduce new statistics into evidence; these apparently were intended to show that while the percentage of minority persons in the population was 41%, the percentage of minority persons in the labor force was substantially lower. On this appeal the City contends that the percentage of minority persons in the labor force in 1975 was 23%, a figure that plaintiffs contend is "impossible."[32] Given the nature of the order in the present case, however, we need not reach the question whether the City may or should now be relieved of its judicial admission.

> to further statistical analysis for the purposes of this action.
>
> 18. In 1975, black males constituted 13.1% of the Labor Force in the city of Bridgeport proper.
>
> 19. In 1975, black females constituted 13.9% of the Labor Force in the city of Bridgeport proper.
>
> 20. In 1975, white males constituted 28.3% of the Labor Force in the city of Bridgeport proper.
>
> 21. In 1975, white females constituted 30.68% of the Labor Force in the city of Bridgeport proper.
>
> 22. In 1975, hispanic males constituted 6.66% of the Labor Force in the city of Bridgeport proper.
>
> 23. In 1975, hispanic females constituted 7.34% of the Labor Force in the city of Bridgeport proper.

On the morning the trial was to begin, the City filed a response that, while denying certain statements, *expressly admitted* all of these statements. The court, finding the City's response untimely, struck the entire response, leaving all of the facts set forth in plaintiffs request, including those above, constructively admitted.

[32] Plaintiffs contend that the percentage figures for minorities in the population and the labor force are closely similar.

In cases in which the district court has fashioned a remedy that requires the defendant to achieve a specified percentage of minority representation in its overall membership or among all its employees, we have ruled that "[s]tatistics as to the poplulation of th[e] work force during the pertinent period should provide a more accurate base than total population statistics for determining what would have been the percentage" of minority applicants hired absent the discrimination. *Rios* v. *Enterprise Ass'n Steamfitters Local 638, supra*, 501 F.2d at 632-33. In *Rios*, the district court had ordered the defendant union to admit minority workers in sufficient numbers to achieve a 30% minority membership. Because the provenance of the 30% figure was not clear, and could have represented population rather than labor force, we remand to the district court for explanation or reconsideration. On the other hand, we have more recently envisioned that temporary goals that exceed the minority proportion of the labor force may be justified if the discrimination has been long-standing and effective:

> Any use of a hiring ratio during the interim period to compensate for prior discrimination, that is, a ratio greater than the minority percentage in the applicant pool or the relevant work force, should be imposed only upon clear evidence and appropriate findings of the need to redress demonstrated prior discrimination of long standing that has had a significant impact on minority employment.

Guardians IV, 630 F.2d at 109 (citations omitted); *United States* v. *City of Buffalo*, 633 F.2d 643, 646-47 (2d Cir. 1980) (per curiam).

In the present case, the amply supported findings of longstanding, egregious discrimination, resulting in a fire department with four minority firefighters out of 512, easily meet the constraints of *Guardians IV*. Moreover, the present order differs from that in *Rios* in that it does not establish a goal of 41% minority representation in the fire department. Since the order uses as its frame of reference only the period during which the

City's discrimination is held unlawful, with the percentage being applied only in relation to nonminority hirees in that limited period, minority representation in the fire department will not, on the basis of the order, come anywhere near 41%. The City now has a total of approximately 508 nonminority firefighters (427 in 1975, plus 81 hired pursuant to the interim orders), and 4 minority firefighters. Using the time frame chosen by the district court, the City was to offer positions to 102 minority firefighters. If all 102 accepted, minority firefighters would total 106 out of 614, or 17.3% — far below even the 23% that the City has here contended is the accurate labor force percentage. The effect of our modification of the time frame is to reduce the percentage even lower: with 73 new minority firefighters, minorities would total 77 out of 585, or 13.2%.

Indeed, since the district court's order does not actually require hiring but only offering (*see* note 26, *supra*, and accompanying text), 13.2% is the *maximum* minority representation that would be achieved in the fire department on the basis of the affirmative relief granted by the order. Any declinations by minority offerees would decrease the percentage pro tanto.

In all the circumstances, we find the district court's use of the 41% figure well within the bounds of its discretion. In recognition of our ruling as to Title VI, we simply direct that the order be modified to limit the number of minority persons to whom offers must be made, before anyone else is hired, to 73.[33]

C. Seniority and the Promotional Freeze

The district court's order, in a section entitled "Seniority," prohibits the City "from giving any promotional examinations to firefighters hired from lists generated by the 1971 or 1975 tests until such time as all the [applicants and those who were deterred from applying for the 1971 and 1975 exams] become qualified to take the promotional examinations." 479 F. Supp. at 117 (footnote omitted). Appellants claim that the promotional freeze impermissibly violates the rights of currently employed firefighters. On the other hand, plaintiffs contend that the district court did not award enough seniority relief. We reject defendants' contentions but find some merit in those of the plaintiffs.

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[33] We also therefore modify the number of persons to whom backpay may be awarded, reducing that number to a maximum of 73.

In *Franks* v. *Bowman Transp. Co., supra*, the Court noted that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation" and that, accordingly, if a victim of discrimination is awarded hiring relief only, without seniority, he "will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed." 424 U.S. at 766, 768. The Court further stated that the possibility that nonminority expectations will be diminished should not prevent awards of constructive seniority to the victims of discriminiation:

> [I]n exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful place seniority relief and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.

424 U.S. at 779 n.41. *See also id.* at 774.

In this case, the court recognized that the wrongful denials of employment to minority individuals in the past would delay their eligibility for promotions. The decision to equalize promotional seniority by delaying the eligibility of those who have already been hired, rather than by ordering instant eligibility for those to be hired, apparently manifests a concern for public safety, and was well within the court's discretion. We note also that the burden of this provision is not itself discriminatory: it does not fall just on nonminority firefighters, but must be borne also by all four of the minority firefighters presently in the department. Moreover, the court did not bar the City from shortening the time-in-grade requirement for the taking of promotional exams, but rather deferred to the City's expertise in deciding whether of not public safety really requires a three-year time-in-grade period. Thus, it may be within the City's power to lessen the burden for those who are already firefighters. To the extent, however, that the time-in-grade requirements must be maintained in order to ensure public safety, the promotional freeze may well prove to be the only method of insuring access to promotions for past victims of the City's discrimination.

Finally, we note that the delay of promotional eligibility is strictly for the purpose of compensating the victims of the City's discrimination. Although the offeree list may include persons who neither applied to take nor were deterred from taking the 1971 or 1975 exam, the order does not require a delay in promotional eligibility to await the eligibility of such nondiscriminatees.[34]

In addition to the promotional freeze, the district court's backpay order provided compensation for the loss of certain other seniority benefits in the form of the monetary value of salary increments, pension rights, and fringe benefits, *see* 479 F. Supp. at 118-19 (definition of backpay). We conclude, however, as plaintiffs argue, that these provisions may have been inadequate as "make-whole" seniority relief: It seems clear that the district court should have awarded to discriminatees the full measure of constructive seniority. *See generally Franks* v. *Bowman Transp. Co., supra,* 424 U.S. at 763-67. Although plaintiffs have not specified what other privileges of seniority they believe have been denied, it may well be that some have been overlooked. For example, if the City maintains a typical last-hired-first-fired seniority system, constructive seniority with respect to lay-offs would be essential to "make whole" relief under Title VII. *See id.* Moreover, the City's seniority system may afford other benefits, such as increased vacation and sickpay entitlements, that should be awarded to discriminatees in order to give them their "rightful place" in the seniority hierarchy. Because the present record does not fully reveal the workings of the City's seniority system, and because it is not clear how full constructive seniority may best be coordinated with the liquidated seniority benefits already conferred in the backpay section of the district court's order, we remand the matter to the district court so that it may appropriately modify its decree.

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[34] Presumably, the City can be expected to offer positions first to those who were the victims of discrimination, in order to limit its backpay obligations. This would also have the effect of minimizing the delay in promotional eligibility.

D. The Backpay Award

After *Albemarle Paper Co.* v. *Moody, supra*, there can be no doubt that the award of backpay is central to the "make whole" purpose of Title VII:

> [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

422 U.S. at 421-22 (footnote omitted). *See also EEOC* v. *Local 638, supra*, 532 F.2d at 832. Having reduced to a maximum of

73 the number of persons who may receive backpay,[35] we note three further respects in which the district court's backpay order requires modification.

First, we find merit in the City's challenge to one of the starting dates for the backpay award. The district court's order provides that persons who were discriminated against with respect to the 1975 exam are entitled to backpay dating back to October 1976, the date on which the City first hired firefighters from the 1975 list. It is clear, however, that not all of the 81 nonminority persons hired pursuant to the 1975 test results were hired in October 1976. Some were hired pursuant to the interim order entered in June 1977. And although the 1976 interim order permitted the immediate hiring of 40, the evidence reveals that only 20 were hired in October 1976, with the remaining hired in 1977. Since "[l]ogically, back pay should be awarded from the date of the unlawful discrimination," Davidson, *"Back Pay" Awards under Title VII of the Civil Rights Act of 1964*, 26 Rutgers L. Rev. 741, 760 (1973), the district court's order should be modified to ensure that the number of minority firefighters to be paid backpay dating back to a given date does not exceed the number of nonminority firefighters hired on that date.

Second, we note that to the extent that the backpay list is not filled with persons to whom firefighters positions must be offered, the names of other actual victims of the City's discrimination may be added. The latter group would include, for example, those who applied for and failed the exams but who are no longer interested in firefighter positions or who do not now meet the City's other requirements. As to this nonofferee group the district court's order does not set a termination date for the backpay obligation. The order should be modified to end the backpay period as of the time the nonofferree ceased or failed to meet any of the City's requirements other than the written exam, or ceased to have interest, whichever is earlier.

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[35] See not 33 *supra*. The number set is a maximum which in fact may not be reached because the district court, properly, awarded backpay only to minority persons who could prove either that they applied to take the 1971 or 1975 exam or that they were deterred from so applying by the City's discriminatory practices.

Finally, we find merit plaintiffs' contention that, as to certain facts relating to the nonofferees group's entitlement to backpay, the court improperly allocated the burden of proof. The order properly placed on each such person the burden of proving that he applied to take the 1971 or 1975 exam, or that he was deterred from applying by the City's discriminatory policy or practices. However, the order also places on these discriminatees the burden of proving that they met the City's requirements other than passage of the written exam. The latter allocation is contrary to Title VII principles. *See Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 502 (2d Cir. 1980). Where there has been an unlawful refusal to hire, individual class members may establish their prima facie entitlement to backpay simply by showing that they applied for the job and were not hired. *Sledge* v. *J. P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). *See also Rodriguez* v. *Taylor*, 569 F.2d 1231, 1239 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Swint* v. *Pullman-Standard Co.*, 539 F.2d 77, 103 (5th Cir. 1976); *EEOC* v. *Local 638, supra*, 532 F. 2d at 832-33. *Cf. International Brotherhood of Teamsters* v. United States, supra, 431 U.S. at 361-62. Similarly, where an unlawful policy and practice of discrimination has been proven, one who was thereby deterred from applying for employment may establish his prima facie entitlement to backpay by proving such deterrence. *See id.* at 365-67; *Grant* v. *Bethlehem Steel Corp.*, 635 F. 2d 1007, 1016 (2d Cir. 1980). The burden then shifts to the defendant to rebut this prima facie showing by proving that the class member would not have been hired even absent discrimination — for example, because no vacancies existed or because the claimant failed to meet nondiscriminatory prerequisites for employment. *E.g., Sledge* v. *J. P. Stevens & Co., supra*, 585 F.2d at 637; *Rodriguez* v. *Taylor, supra*, 569 F.2d at 1240; *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073, 1086 (4th Cir. 1977); *cf. Franks* v. *Bowman Transp. Co., supra*, 424 U.S. at 772-73 & n.32.

With respect to most of the City's prerequisites—*i.e.*, those relating to the candidate's age, residence, education, and possession of a driver's license—we would expect the allocation of the burden of proof to have little impact. However, two prerequisites relate to the physical condition of the candidate in 1971 or 1975, and the order would require that the nonofferee candidate prove that he would have passed the physical agility test and the medical tests that were administered. Proof of prior health or physical conditioning may not be so readily available as would be proof of age, education, etc. If direct proof is unavailable on these questions, it is attributable to the discriminatory policies and practices of the City, which prevented the actual taking of such tests as would have been taken, absent the discrimination. Therefore, to the extent that it is uncertain whether a candidate would have met the City's nondiscriminatory requirements, the uncertainty "should be resolved against the defendant, the party responsible for the lack of certainty." *Cohen* v. *West Haven Board of Police Commissioners, supra*, 638 F.2d at 502; *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Day* v. *Matthews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976) (per curiam). Paragraphs D(1)(b)(1)-(v) and D(1)(c)(i)-(v) of the district court's order, relating to the burden of proof on these requirements, should be modified accordingly.

VI. CONCLUSION

We affirm the district court's rulings as to liability under Title VII and the Revenue Sharing Act, and vacate the finding of liability under Title VI. We remand for modification of the remedial provisions, in accordance with this opinion, (1) to decrease to 73 the number of minority-persons who must be offered firefighter positions; (2) to decrease to a maximum of 73 the number of minority persons who are awarded backpay; (3) to adjust the starting and ending dates of certain backpay awards; (4) to allow discriminatees to prove their prima facie entitlement to backpay by showing that they applied to take the 1971 or 1975 exam, or were deterred from so applying by the City's discriminatory practices; and (5) to award appropriate constructive seniority to individual discriminatees who are hired. In all other respects, we affirm the judgment of the district court.

No costs.

VAN GRAAFEILAND, *Circuit Judge* (concurring)

I wish that I could concur without reservation in Judge Kearse's comprehensive opinion, but I am unable to do so.

In the first place, I believe that the district court erred in not reopening the proof on remand to permit full development of the facts relative to the claim on long-continued and historical discrimination. Without more knowledge of the factual background, I find little support for a finding of long-term discrimination in figures which show that only one black took a test in 1965 and only three blacks took a test in 1968, and none of the four passed. Twenty-two white persons failed to pass these same examinations. On this proof alone, I am not prepared to assume that four failed because they were black and twenty-two failed although they were white.

I am also disturbed about the increased fervor of the attacks upon written civil service examinations. *See Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 428-29 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975), *cert denied*, 429 U.S. 823 (1976). I do not agree that every high school graduate who can pass a physical examination is qualified to become a fire fighter. Assuming, however, that this is so, I am convinced that some high school graduates are better qualified than others. If, five years from now, 1,000 high school graduates pass the physical examination for 100 job openings in the Bridgeport Fire Department, what criteria besides race and sex shall the City use in deciding which ones to hire? Must it revive the discredited spoils system?

I do not believe that a municipality which works with a "respected management firm" to develop, at a cost of

$100,000.00 and 2,745 manhours, a legally satisfactory examination and thereafter uses the examination in good faith is following a policy of discrimination. If the examination is unsatisfactory, the proper course, I submit, is to prepare another one, not to require firemen to trust their lives to colleagues who are thrust upon them by a federal court and whose sole qualifications are the possession of a Connecticut driver's license and an all-too-easily obtainable high school diploma.

Finally, I am concerned about that portion of the majority opinion which orders affirmative relief for others than discriminatees. In 1975 white males comprised only twenty-eight percent of Bridgeport's labor force. Twenty percent were women. Although the judgment herein is limited to blacks and Hispanics, it is quite obvious that women have no greater representation than blacks or Hispanics in the Bridgeport Fire Department. It is not unreasonable, therefore, to anticipate that litigation on behalf of the female members of the "minority" will follow plaintiffs' successful efforts in this case. *See* 42 U.S.C. § 2000e-2(a). I have already expressed my concern that we are headed inexorably to a situation in which the white American male, because of his "majority" status, will be legally precluded from holding more than a minority of jobs in any field. *See Local Union No. 34, IBEW* v. *City of Hartford*, 625 F.2d 416, 425-29 (2d Cir. 1980)(Van Graafeiland, *J.*, dissenting). It appears that this field will in due course include membership in the Bridgeport Fire Department.

Despite the foregoing reservations, I think that racial harmony in Bridgeport will be advanced best by brining this protracted litigation to a close. I therefore concur in the result.

Appendix

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81-373

No.

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BRIDGEPORT FIREFIGHTERS FOR MERIT EMPLOYMENT, INC., LT. JOSEPH DICARLO, LT. THOMAS NAPLES, LT. PHILIP LYNCH, FIREFIGHTER THOMAS O'CONNELL, LT. FRANK G. BENDER, LT. ROBERT B. ANDERSON
Petitioners,

V.

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., ROOSEVELT JOHNSON, CRAIG KELLY, CHARLES HERD, ROBERT LEWIS, WILLIAM CARY, CHARLES R. YOUNG, HERMAN AGOSTO, HARMIN LINARES, ISMAEL POMALES, SALVADOR PEREZ, and on behalf of all other similarly situated,
Respondents.

APPENDIX

VOLUME TWO

August 24, 1981

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INC., et al.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASSOCIATION AGAINST DISCRIMINATION
IN EMPLOYMENT, INC., et al,

Plaintiffs

-vs-

THE CITY OF BRIDGEPORT, et al.

Defendants.

MEMORANDUM OF DECISION

DALY, District Judge

This employment discrimination case is before this Court on remand from the Court of Appeals. *See Association Against Discrimination in Employment* v. *City of Bridgeport,* 594 F.2d 306 (2d Cir. 1979).[1] The named plaintiffs represent the class of all black and hispanic persons who are alleged victims of the City of Bridgeport's allegedly discriminatory employment practices with respect to hiring in the Bridgeport Fire Department. The defendants are the City of Bridgeport and its Civil Service Commission, Board of Fire Commissioners, Fire Chief Engineer, and Mayor. A group of Bridgeport's firefighters, Bridgeport Firefighters for Merit Employment, Inc., has been permitted to intervene, as defendants-intervenors. Subsequent to the remand by the Court of Appeals, the United States was given leave to participate as *amicus curiae.*

Plaintiffs allege that defendants have engaged in a policy and practice of discriminating on the basis or race, color, and/or national origin with respect to entry-level employment in the

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[1] This Court's prior decisions concerning liability and the appropriate remedy are reported at 454 F. Supp. 751 (D. Conn. 1978) and 454 F. Supp. 758 (D. Conn. 1978), respectively.

Bridgeport Fire Department, in violation of Title VII of the Civil Rights Act of 1964, as amended 1972, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970 ed. and Supp. V); and § 122(a) of the Revenue Sharing Act, 31 U.S.C. § 1242(a) (1976 ed.).

LIABILITY

Title VII

I.

The credible evidence in this case establishes that the City of Bridgeport has a long history of and strong reputation for discriminating against black and hispanic persons in its hiring of firefighters. The City has engaged in a continuing pattern and practice of post-Title VII discrimination, that is discrimination

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[2] While the Court's prior decision concerning liability, *see* n. 1, *supra,* dealt primarily with the question whether the 1975 firefighters exam violated Title VII on a disparate impact theory, nothing in that opinion or in the decision of the Court of Appeals limited the scope of the matters otherwise properly before this Court. The EEOC complaints on which this action is founded contain sufficient allegations to place before this Court the issue of whether defendants have violated Titles VI or VII or the Revenue Sharing Act by engaging in a continuing policy and practice of discriminating against black and hispanic persons in entry-level hiring of firefighters. *Cf. Silver* v. *Mahasco Corp.,* No. 78-7595 (2d Cir. July 18, 1979). "A continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the *last occurrence* of an instance of that policy." *Acha* v. *Beame,* 570 F. 2d 57, 65 (2d Cir. 1978) (emphasis in original). The question of the scope of this case was raised at the outset of trial when defendants' and intervenors' objections to the introduction of evidence relating to matters other than the 1975 test were overruled. (Tr. at 3-6). Since at least that time, all counsel have had explicit notice that the scope of this case extended beyond the question of whether defendants violated Title VII by hiring on the basis of the 1975 test.

occurring since March 24, 1972, against black and hispanic persons by: (1) failing properly to recruit minority applicants, (2) actively deterring minority persons who have sought to become firefighters, and (3) hiring firefighters on the basis of discriminatory qualifying examinations.

The defendants may be held liable under Title VII only for discrimination occurring after March 24, 1972, the date on which the Act became applicable to municipal employers. *Hazelwood School District* v. *United States,* 433 U.S. 299, 309 (1977); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 356-57 (1977). A history of pre-Act discrimination, however, may be used as a backdrop against which to evaluate post-Act conduct. *Hazelwood School District* v. *United States, supra,* 433 U.S. at 309 n. 15 (1977). "Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued...." *Id.* Moreover, defendants may be held liable if their post-Act conduct unlawfully perpetuates pre-Act discrimination. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1971); *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 360 (8th Cir. 1973); *United States* v. *Sheet Metal Workers Local 36,* 416 F.2d 123, 139 (8th Cir. 1969); *United States* v. *Central Motor Lines, Inc.,* 338 F. Supp. 532, 558-59 (W.D.N.C. 1971), *appeal on other grounds dismissed sub. nom. EEOC* v. *Central Motor Lines,* 537 F.2d 1162 (4th Cir. 1976).

Statistics showing gross disparities between the percentage of minority persons employed by a defendant and the percentages of minority persons in the relevant labor market have been held to establish *prima facie* proof of discrimination, *Hazelwood School District* v. *United States, supra* at 307-08; *United States* v. *Fresno Unified School District,* 592 F.2d 1088, 1096 n.5 (9th Cir. 1979); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 551 & n. 21 (9th Cir.), *cert. denied* 404 U.S. 984 (1971), particularly where supported by evidence of individual instances of discrimination. *International Brotherhood of Teamsters* v. *United States, supra* at 339. "Statistics showing racial or ethnic imbalance are probative...because such imbalance is often a telltale sign of purposeful discrimination...." *Id.* at 339-40 n. 20, 97 S.Ct. at 1856 n. 20.

II.

The statistics in this case speak for themselves. Between 1965 and March 24, 1972, the City hired 85 firefighters, 84 of whom were white. Later in 1972, the City hired an additional 28 firefighters, all of whom were white. In 1975, when black and hispanic persons comprised approximately 41% of Bridgeport's labor force, its Fire Department had 427 whites, one hispanic, and no blacks.[3] In its entire history prior to 1975, the City had employed only two minority firefighters, one of whom had been hired in 1938. Since 1975, the City has hired an additional 84 firefighters, 81 of whom have been white.[4] As the Court of

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[3] The City has a one-year residency requirement for firefighter applicants, and is itself, therefore, the relevant labor market. *See EEOC* v. *Local 14, International Union of Operating Engineers,* 553 F. 2d 251, 254 (2d Cir. 1977).

[4] The 84 firefighters hired since 1975 were hired pursuant to a court-approved agreement among the parties. The parties agreed, in relevant part,

> that the defendants may make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding. In the event the Court should order a hiring plan, these appointments will be counted as part of such plan.

The Court of Appeals suggested that this Court should "explicitly consider all the implications of" the hiring agreement. 594 F. 2d at 312. The implications of the agreement seem clear. Plaintiffs agreed not to seek to enjoin defendants from hiring firefighters from the 1975 list, provided that defendants warranted that there was and would remain an immediate need and adequate funding for a number of firefighters equal to the number actually hired pursuant to the agreement.

Appeals noted with respect to the composition of the Fire Department in 1975, "[n]o manner of legal argument can justify th[ese] unpleasant fact[s]." 594 F.2d at 308.

The statistics in this case, while alone presenting compelling evidence of discrimination by the City, are not the only evidence of such discrimination. The evidence also establishes that in light of its reputation as a discriminatory employer the City has failed properly to recruit minority applicants for the Fire Department and has discriminated against minority individuals who have sought to apply for positions with the Fire Department.

Not surprisingly, the City's reputation as an employer has corresponded to the statistics above. By 1972, the City had established a reputation for employment discrimination against black and hispanic persons that was "by far the worst" of all cities in Connecticut. (Tr. at 733)[5] (testimony of Arthur Green, Connecticut Commission on Human Rights & Opportunities). This reputation created the attitude in the black community that "[i]f you're black, just don't apply because you won't get the job." (Tr. at 1963) (testimony of J. Michael Smith, District Director of Association for Bridgeport Community Development). In keeping with this reputation, the City never has made any significant efforts to remedy its situation by recruiting

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There is nothing to indicate that defendants agreed to quota relief, or that plaintiffs agreed that defendants would not be liable for back pay. This Court sees no reason to conclude either that the judicial approval of the hiring agreement operated to absolve defendants of any liability, or that defendants conceded by entering into the agreement that quota or any other type of relief would be appropriate.

[5] Unless other dates are noted specifically, the transcript referred to (Tr.) is that of the trial on liability, spanning dates from October 28, 1977 to December 1, 1977.

minority applicants for positions in the Fire Department.[6] Absolutely no attempts were made to recruit minority applicants for qualifying examinations prior to 1972. Despite the testimony of John Colligan, Personnel Assistant for the City of Bridgeport, that the City had a "very extensive recruitment program" of minority applicants for the 1975 exam (Tr. at 865), the credible evidence established that the City's recruitment efforts for that exam did not approach the dimensions of the "multi-media" campaign described by Colligan. (*Id.*)[7]

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[6] The gross disparity between the minority percentage of the City's population and the minority percentage of the applicants for the firefighters tests in question supports the inference that defendant have unlawfully deterred minority persons from filing applications. Only 14.3% of the applicants who sat for the 1975 exam, for instance, were minority persons, compared to the 41% minority representation in the City's population. The disparity with regard to earlier examinations is even more dramatic. *See* n. 9, *infra.*

[7] John Colligan, Personnel Assistant for the City of Bridgeport, testified that with regard to the 1975 exam, "[w]e had a very extensive recruitment program for the position of firefighter in the City of Bridgeport.... [I]t was what you would call a multi-media campaign." (Tr. at 865). He stated that newspaper ads were placed in the Bridgeport Post and Telegram and in "the local minority newspaper, the Harumbie Union...," *Id.*, and that radio ads were placed on minority-oriented programs on stations WICC, WNAB, and WLVH. He also indicated that the City "worked with virtually every minority community leader that we had contact with," (Tr. at 866), and "also had the assistance of the Bridgeport Guardian Association, which is a fraternal organization of black police officers, and they assisted us ably in the recruitment." *Id.* When asked specifically "who in the Bridgeport Guardian assisted you," Colligan stated that "Ted Meekins and Alerise Best both came to the Civil Service Office on several occasions and picked up applications," (Tr. at 954). When asked whether anyone else from the Guardians assisted, Colligan stated "[t]o my knowledge it was Ted Meekins and Alerise Best." *Id.*

The credible evidence established, however, that the City's recruitment efforts did not approach the dimensions of the "multi-media" campaign described by Colligan. William Abbott, Managing Director

The only significant minority recruitment effort for the 1975 test was undertaken not by the City but by a coalition of community minority groups coordinated by Thomas Thompson, Director of the United States Labor Department Recruitment and Training Program in Bridgeport. The coalition was formed in 1973 "to try and establish some type of vehicle to assist minorities in gaining access to civil service jobs, particularly in the police and fire department." (Tr. at 46). When the coalition learned the 1975 exam would be given, its members "did on-the-street recruitment, both on the east end, west end, south end, all parts of town, by stopping individuals in pool rooms, bars, individuals walking down the street and asking them were they interested in taking the examination." (Tr. at 54). The coalition held community meetings to inform the minority community of the opportunity to take the firefighters test. Most significantly, the coalition held training sessions and provided instructors to prepare applicants for the test. These sessions were open to anyone, regardless of race, and were held three or four nights a week for three hours each night. Individual applicants attended these sessions for one to two months prior to the exam.

The City was fully aware of the coalition's recruitment efforts, but did little to assist the coalition and, in fact, partially impeded its effort. After the coalition had been formed, Thompson approached the then-Mayor, requesting that the City take action to recruit minority firefighters and offering the coalition's assistance in that effort. The Mayor apparently was

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of WNAB Broadcast Center in Bridgeport, stated that no "paid" ad had been placed on the station for the 1975 test and that he was "almost...certain" that no "Public Service spots" had been used. (Tr. at 1950-51). Jose Grimald, President of WLVH in Hartford, testified that his station had no records of any advertising by the City of Bridgeport for the 1975 firefighters exam. Both Alerise Best and Theophilus (Ted) Meekins testified that they never had been asked to and never had participated in any way in recruitment for the 1975 firefighters exam. This evidence effectively destroyed any potential probative value of Colligan's testimony concerning an "extensive," "multi-media" recruitment effort by the City of Bridgeport.

receptive to this suggestion, and members of the coalition subsequently met with the City's Civil Service Personnel Director and representatives from the Fire Department. Ultimately, however, the City assisted the coalition in only two ways. First, the Civil Service Commission altered its apparently long-standing policy of requiring applicants to submit applications in person at the Commission's offices in City Hall, and permitted the coalition to accept applications at the offices of the Association for Bridgeport Community Development (ABCD).[8] As will be discussed later, however, some problems developed relating to the processing of these applications. Second, the Personnel Director, Alan Cohen, provided the coalition with a "notice of examination" that outlined in a general way the subjects to be covered by the test. The notice contained the following language:

> Further, candidates must possess the following: mental alertness, mechanical aptitude, aptitude for increasing knowledge of the trade and for learning the variety of work performed by Fire Fighters; good knowledge of first aid and a working knowledge of the geography of the City of Bridgeport; ability to read and write understandingly [sic] the English language.

Based on Cohen's statement that the subjects mentioned in the notice would be covered on the test and that the coalition could use the notice as a guide to what would be on the test, the coalition focused its training program on these subjects. The coalition obtained a selection of tools used by firefighters and trained applicants in their use. Applicants were provided with maps of Bridgeport so that they could become familiar with its geography, and a first aid course was given.

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[8] Throughout the time period discussed in this opinion, the staff at the Civil Service Commission Office has been all white. By failing to employ minority persons in this office, the City, in effect, has placed "a sign reading 'Whites Only' on the hiring office door,..." *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 365 (1977).

The questions on the 1975 test, however, bore no resemblance to the questions anticipated by those who had gone through the coalition training program. There were no questions involving geography, first aid, or the use of firefighting equipment. Those who had been through the training program were thus potentially at a disadvantage, having been led to believe that they would be taking a test vastly different from the one placed before them. These applicants were disappointed and felt that "[t]he City has fooled us again." (Tr. at 161). Needless to say, the ultimate results of the 1975 test served only to strengthen the City's reputation as a discriminatory employer.

With the exception of these two rather ineffective and perhaps detrimental efforts to assist the coalition, the City did nothing to assist, endorse, publicize or otherwise associate itself with the coalition's recruitment effort.

The credible evidence also establishes that there were several instances of individual discrimination against minority applicants at the time of the 1975 test. Elias Castro is an hispanic person who has had four years' experience as a firefighter in the United States Air Force. Through an arrangement, mentioned earlier, between the Bridgeport Civil Service Commission and Thomas Thompson, Director of the United States Department of Labor Recruitment and Training Program for Bridgeport, Castro was allowed to and did file his application to become a firefighter at the offices of the Association for Bridgeport Community Development (ABCD). (The Civil Service Commission, prior to the 1975 exam, had required that all applications be filed at its office in City Hall.) Castro expected that his application would be forwarded by ABCD to the Civil Service Commission. On the last day for filing applications, Castro was informed that the Civil Service Commission did not have his application. He immediately went to the Civil Service Commission Office and attempted to file another application. Although it was still mid-afternoon on the last day for filing applications, Castro was told that it was "too late" for him to file another application. Castro unsuccessfully sought to speak to the superior of the person who had told him he could not file an application. Castro was not informed of any means by which he could appeal or officially complain of the refusal to accept his application. He did not take the 1975 firefighters exam.

Harmen Linares is an hispanic individual who filled out a timely application for the 1975 exam at the Civil Service Commission Office. He was told that he would receive notice notice in the mail of the date and time of the examination. Linares never received any notice, and later learned that he had missed the examination.

Ismael Pomales is an hispanic individual who took the 1975 examination and passed it but did not receive any notification that he had passed until he was informed by registered mail that his name was being removed from the list because he had not appeared for his scheduled physical agility examination. The registered letter he received did not indicate that he could take any steps to appeal the Commission's action in removing his name from the list.

Defendants also have discriminated against black and hispanic persons by using discriminatory firefighters qualifying tests. All of the firefighters qualifying examinations given by the City since 1965 have been discriminatory in that they have had a disparate impact on minorities and have not been job related. The City has admitted that all firefighters qualifying examinations given between 1965 and 1972 had a disparate impact on minorities and were not job related, and the evidence in the case supports this admission.[9] This Court found in its

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[9] Firefighters qualifying examinations were administered by the City in 1965, 1968, and 1971. The following table illustrates the racial composition of the applicant groups for each test:

Year	Total Applicants	White	Black	Hispanic	Unknown
1965	32	26	1	1	4
1968	75	59	3	1	12
1971	277	225	13	2	37

previous opinion that the 1975 examination, the only one that has been administered since 1972, had a disparate impact on minorities and was not job related, *see Association Against Discrimination in Employment* v. *City of Bridgeport,* 454 F.Supp. 754, 758 (D. Conn. 1978), and those findings are hereby reaffirmed and incorporated by reference herein. The Court now also finds that the disparate impact of the 1975 exam would not

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The following table illustrates the composite pass rate, by race, for all three tests combined:

Race	All	White	Black	Hispanic	Unknown
# of Applicants	384	310	17	4	53
# Passing	113	112	0	1	0
% Passing	29.4%	36.2%	0%	25%	0%

If the figures for black and hispanic applicants are combined, the composite passing percentage (1/21) is 4.8%. If the assumption is made that all unknown applicants were white (this assumption tends to minimize disparate impact in this situation because all unknown applicants failed), the composite white passing rate (112/363) is reduced but only to 30.9%, a percentage still far exceeding the minority pass rate figure. These statistics appear to present a sample size large enough to be probative of discrimination, *United States* v. *San Diego County,* Civil No. 76-1094-S, Memorandum of Decision at 15 (S.D.Cal. July 6, 1979), particularly where the number of minority persons hired approaches "the inexorable zero." *See International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 342 n. 23 (1977).

No effort ever had been made by the City to validate a firefighters test before the 1975 test. The pre-1975 tests were of a type held to be discriminatory in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973), *on remand.* Civil No. B-457 (D.Conn. Oct. 3, 1973), *aff'd* 497 F.2d 1113 (2d Cir. 1974), *cert. denied* 421 U.S. 991 (1975).

have been eliminated simply by reducing the passing score to 6.[10]

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[10] The Court of Appeals suggested in its decision that this Court consider on remand defendants' claim that lowering the passing score of the 1975 exam to 6 would eliminate disparate impact and thereby absolve defendants from liability in this case. The Court of Appeals wrote:

> ...We have found no authority on whether an employer who selects a cut-off score and defends it until the test has been found not job-related can then avoid the implications of that finding by adjusting the passing score to a point where the disparate impact is arguably insignificant.

594 F.2d at 313 n.20. This Court finds that this intriguing issue is not before it because, first, simply lowering the passing score of the 1975 exam to 6 would not eliminate the exam's disparate impact, and, second, this Court now finds that defendants have engaged in a policy and practice of discrimination extending well beyond the 1975 exam.

A total of 771 individuals took the 1975 exam. All applicants now have been racially identified. The following table illustrates the passing rates of whites and minority persons at scores of 12 and 6.

PASSING SCORE OF 12

	Total Tested	Passed	Failed	% Passing
White	661	184	477	27.8
Minority	110	8	102	7.3

PASSING SCORE OF 6

	Total Tested	Passed	Failed	% Passing
White	661	448	213	67.8
Minority	110	59	51	53.6

A lowering of the passing score to 6, then, would reduce the disparity between white and minority pass rates from 20.5 percentage points to 14.2. Dr. John Peck, plaintiffs' expert, testified, however, that a difference of 14.2 would remain very highly significant. He calculated that the likelihood of this difference being attributable to chance

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would be less than five chances in one thousand. Dr. Alan Gelfand, intervenors' expert, also testified that simply lowering the score to 6 would not eliminate disparate impact.

Even if lowering the score to 6 would eliminate disparate impact with respect to the absolute numbers of whites and minority persons passing, the disparate impact in terms of ranking would not be eliminated simply by lowering the score. The top 84 candidates on the list would have been hired, and 81 of them are white. The list would have a disparate impact on minority persons because whites would tend to be hired first. In fact, because 507 applicants scored 6 or higher on the test, and the Fire Department currently has only 121 vacancies, those who passed the test but who are on the lower end of the list probably would not be hired at all even if the passing score were reduced. (This remains true if the 84 who have been hired are taken into account; 423 applicants would remain to compete for 121 positions.) *See Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 392 (2d Cir. 1973). Simply lowering the score to 6, then would not eliminate disparate impact.

Defendants and Intervenors have suggested that the Court should order some hiring plan that involves a lowering of the passing score to 6 and an elimination of the ranking system. They suggest the establishment of two pools of passing candidates, one white pool and one minority pool, from which candidates could be chosen at random pursuant to a formula that would ensure that the percentage of minority persons hired from the passing list would equal the percentage of minority persons who sat for the exam, thus eliminating disparate impact with respect to both absolute numbers and ranking. The result of such a Court-ordered plan, it is argued, would be a finding that defendants are not liable for discrimination with respect to the 1975 exam. In view of its finding that the City has engaged in a continuing policy and practice of discriminating against black and hispanic persons, this Court perceives no need to address this novel contention. *See EEOC* v. *Local 638,* 532 F.2d 821, 826 (2d Cir. 1976).

The Court would note, however, that one serious problem with the approach suggested by defendants and defendants-intervenors is that it would involve Court-ordered hiring on the basis of an exam that is not job related. The Court, in its previous opinion, found serious

III.

Defendants have violated Title VII by failing properly to recruit minority applicants, thus perpetuating the deterrent effect of pre-Act discrimination. *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated* and *remanded on other grounds* 423 U.S. 809, *modified* 526 F.2d 722 (8th Cir. 1975); *United States* v. *Sheet Metal Workers Local 36, supra,* 416 F.2d at 137-40; *United States* v. *Central Motor Lines, Inc., supra,* 338 F.Supp. at 558. *See Bridgeport Guardians* v. *Members of Bridgeport Civil Service Commission,* 482 F.2d 1333, 1340 (2d Cir.), *on remand on other grounds* Civil No. B-457 (D. Conn. Oct. 3, 1973), *aff'd* 497 F.2d 1113 (2d Cir. 1974), *cert. denied* 421 U.S. 991 (1975). Primary reliance on word-of-mouth recruitment is unlawful under the circumstances present here.

deficiencies in the method of preparation and validation of the 1975 exam. The Court now also notes that in reaching its conclusion that there was a correlation between how well a firefighter performed on the 1975 test battery and how well that firefighter was rated by his superiors, Hay Associates used "out-of-range" and "blank" data. "Out-of-range" data are data indicating that an individual has received a score outside of the possible range of scores. Such data may be the result of clerical error. "Blank" data are data indicating that no score at all was received by certain individuals, perhaps indicating that those individuals had not taken the test in question. The computer used by Hay interpreted these "blanks" as zeros. The use of these data in this case seriously altered the results of Hay's correlation calculations. Plaintiffs' expert, Dr. Peck, testified that if adjustments were made to compensate for this misuse of data, there would be no significant correlation between job performance and performance on the 1975 test, (Tr. at 2205). Hay's own validation data then, showed that "as far as test passing is concerned, it would be about as good a predictor [of job performance] as tossing a coin...." (Tr. at 2219) (testimony of Dr. John Peck). Moreover, if adjustments are made for the misuse of "blank" scores, Hay's own validation data reveal that the FIT Mechanics test was significantly discriminatory against blacks. (Tr. at 2247-53). Dr. Peck testified that "someone who had followed appropriate statistical methodology and wished to eliminate tests with a disparate impact..." would not have used the FIT Mechanics test as part of the 1975 firefighters test. (Tr. at 2256).

United States v. *Georgia Power Co.*, 474 F.2d 906, 925-26 (5th Cir. 1973). *See also Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 418-19 (5th Cir. 1974), *reversed on other grounds,* 424 U.S. 747 (1976); *Stamps* v. *Detroit Edison Co.*, 365 F.Supp. 87, 117 (E.D. Mich. 1973), *aff'd in relevant part* 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds* 431 U.S. 951 (1977).

Defendants also have violated Title VII by engaging in isolated acts of discrimination against individual applicants for firefighters' positions. *See International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 338 n. 19, 97 S.Ct. 1843.

Finally, defendants have violated Title VII by hiring firefighters since March 24, 1972 from lists generated by examinations that had disparate impacts on black and hispanic persons and were not job related. *See Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977) 97 S.Ct. 2720, 531 L.Ed.2d 786 (1977). Twenty-eight firefighters were hired in 1972 from a list generated by a 1971 exam. This post-Act hiring of firefighters violated Title VII even though the 1971 exam was administered before the Act became applicable to the City. *Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission,* 466 F. Supp. 1273, 1277 (S.D.N.Y. 1979). An additional 84 firefighters were hired as a result of a 1975 exam that this Court has found to have been discriminatory. 454 F.Supp. at 758. Of the 112 firefighters hired since March 24, 1972, 109 have been white, while three have been black or hispanic.

In summary, this Court finds that since March 24, 1972, defendants have violated Title VII by engaging in a policy and practice of discrimination against black and hispanic persons relative to entry-level hiring in the Bridgeport Fire Department.

Title VI

Title VI, which became effective July 2, 1964, prohibits discrimination in "any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1970 ed. and Supp.V).

It is now clear that a private right of action exists under Title VI, *Cannon* v. *University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and that the remedies that are available under Title VII also are available under Title VI. *Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission of the City of New York, supra* at 1280-87.

Defendants, in their answer, have admitted that federal funds have been received by the City and expended in the Fire Department. Plaintiffs have proven that such funds were received and expended in the Fire Department in each year between 1971 and 1977.

In 1971, the City administered a firefighters qualifying examination that had a disparate impact on black and hispanic applicants and that was not job related. The City made no efforts to recruit minority applicants for this test. In 1970, Thomas Thompson spoke to the then-Mayor[11] about the lack of minority firefighters in Bridgeport. Thompson suggested the establishment of an office of affirmative action to deal with minority hiring in the City, particularly in the Fire Department. Thompson explained that he was the director of a federal recruitment program and would be willing to undertake efforts to recruit minority applicants. Not only was Thompson never asked to help recruit for the 1971 exam, he was never informed that the test would be given. He learned of it only after it had been administered. Of the 72 people who passed the exam, 71 were white. All 72 were hired during 1971 and 1972.

In view of the City's long history of and reputation for discrimination against minorities with respect to employment in its Fire Department, its failure actively to recruit minorities for the 1971 test violated Title VI. *See Rogers* v. *International Paper Co., supra.* The City's failure to inform Thompson of its plans to administer the 1971 test is evidence that its failure to recruit minority applicants was purposeful. The test itself, as stated above, was discriminatory. For all of these reasons, and for the reasons stated earlier with respect to Title VII, this Court finds that since 1971, defendants have engaged in a continuing course of conduct in violation of Title VI by engaging in a policy and practice of discriminating against black and hispanic persons with regard to entry-level employment in the Bridgeport Fire Department.

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[11] The Mayor referred to here is not the same Mayor referred to in the text at p. 107, *supra.*

The Revenue Sharing Act

The Revenue Sharing Act prohibits discrimination in programs and activities receiving revenue sharing funds. 31 U.S.C. § 1242(a) (1976 ed.). The Act expressly provides for private civil actions. 21 U.S.C. § 1244(a). *See also United States* v. *City of Chicago,* 395 F.Supp. 329, 342 n. 5 (N.D.Ill.), *aff'd* 525 F.2d 695 (7th Cir. 1975). Plaintiffs here appropriately have exhausted administrative remedies. *See* 31 U.S.C. § 1244(d) (2). The City of Bridgeport has received revenue sharing funds in each year beginning with 1973 and has expended a portion of them in the operation of its Fire Department. (Tr. at 784-786) (testimony of then-Controller John Norko). For the reasons stated with respect to Titles VI and VII, above, this Court finds that defendants, since January 1, 1973, have violated the Revenue Sharing Act by engaging in a policy and practice of discriminating against black and hispanic persons in regard to entry-level hiring in the Bridgeport Fire Department.

Summary

In summary, the Court finds that defendants, by engaging in a continuing policy and practice of discriminating against blacks and hispanic persons in regard to entry-level hiring in the Bridgeport Fire Department, have violated Title VI since January 1, 1971, Title VII since March 24, 1972, and the Revenue Sharing Act since January 1, 1973.

REMEDY

Titles VI & VII

I.

"Once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practice," *Rios* v. *Enterprise Association Steamfitters Local 638,* 501 F.2d 622, 629 (2d Cir. 1974), and "to grant affirmative relief to combat the invidious and often subtle practices of discrimination." *United States* v. *Wood, Wire & Metal Lathers International Union, Local 46,* 471 F.2d 408, 413 (2d Cir.) *cert. denied,* 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). The purpose of the grant of broad remedial discretion is to permit the district court to fashion "the most complete relief possible" to "make whole" those who have been victims of unlawful discriminatory practices. *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). While recognizing that "any attempt to reconstruct what would have happened in the absence of discrimination is fraught with considerable difficulty," *Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 632, and that "no remedy is perfect," *Kirkland* v. *New York State Department of Correctional Services,* 531 F.2d 5, 10 (2d Cir. 1975) (Mansfield, J., dissenting), *cert. denied* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), *rehearing denied* 429 U.S. 1124, 97 S.Ct. 1162, 51 L.Ed.2d 574 (1977), the district court should make its best attempt to fashion a "fair measure of redress" for those who have been discriminated against "at no undue expense" to others. *Chance* v. *Board of Bar Examiners,* 534 F.2d 993, 1003 (2d Cir. 1976) (Oakes, J., dissenting), *cert. denied* 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 *rehearing denied* 434 U.S. 881, 98 S.Ct. 243, 54 L.Ed.2d 164 (1977). The federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albermarle Paper Co.* v. *Moody, supra,* 422 U.S. at 418, *quoting Louisiana* v. *United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

As noted earlier, the remedies available for Title VI violations are the same as those available for Title VII violations. *Guardians Association of the New York City Police Department, Inc.* v. *Civil Service Commission of the City of New York, supra.* Defendants have violated Title VI since January 1, 1971 and Title VII since March 24, 1972. The Court's power under Titles VI or VII thus is limited to remedying discrimination that occurred after January 1, 1971. *Hazelwood School District* v. *United States, supra,* 433 U.S. at 309, n. 15, 97 S.Ct. 2736.

While aware that the imposition of race-conscious hiring orders should be approached in a "gingerly fashion," *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied* 531 F.2d 5 (2d Cir. 1975), *cert. denied* 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976), *rehearing denied* 429 U.S. 1124, 97 S.Ct. 1162, 51 L.Ed.2d 574 (1977), and utilized only if necessary to redress "a clear-cut pattern of long-continued and egregious racial discrimination," *Association Against Discrimination in Employment* v. *City of Bridgeport, supra,* 594 F.2d at 310, *quoting Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427, this Court concludes that it would be "shirking its duty to fashion an effective remedy were it not to order such relief here." *United States* v. *San Diego County,* Civil No. 76-1094-S. Memo. of Decision at 18 (S.D.Cal. July 6, 1979); *cf. Albermarle Paper Co.* v. *Moody, supra.* It is clear that the City of Bridgeport has engaged in a "clearcut pattern of long-continued and egregious racial discrimination" with regard to hiring in the Bridgeport Fire Department. This fact is apparent from a cursory examination of the statistical evidence in this case. Two-fifths of the residents of the City are minority persons, but the minority representation on the Fire Department approaches the "inexorable zero." *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 342 n. 23, 97 S.Ct. 1843.

Other factors support the conclusion that the discrimination has been "egregious." These include the City's refusal actively to recruit minority persons, its failure to inform Thomas Thompson that the 1971 firefighters exam was to be given, its failure to comply with its own affirmative action plan,[12] its maintenance of an all-white Department of Civil Service throughout the period discussed in this opinion,[13] and its individual instances of discrimination against minority persons who actively sought to become firefighters. This Court also finds that the discrimination has been "long-continued" whether one examines the entire history of the City's hiring of firefighters or only its post-Act conduct.

A hiring order is particularly appropriate here because the City is a public employer and the Fire Department is a highly visible municipal uniformed service. *Bridgeport Guardians Inc.* v. *Members of Bridgeport Civil Service Commission, supra,* 482 F.2d at 1341. At the remedy hearing before this Court on July 20, 1978, counsel for the City acknowledged that

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[12] In 1973, after the original decision in *Bridgeport Guardians* v. *Bridgeport Civil Service Commission, supra,* involving Bridgeport's Police Department, the City drafted an Affirmative Action Plan. The draft indicated that

> problems have resulted from the City's failure to modify its existing employment practices, which are extremely inflexible and insensitive to employment issues concerning protected classes. To date, the City has failed to take any aggressive action to comply with Equal Employment Opportunity Legislation.

(Ex. 55, p. 102). The Plan was not adopted until several years later when the City was forced to adopt an acceptable Plan or forego receipt of approximately $7 million in federal funds. (Tr. at 647, 1966). The statements in this Affirmative Action Plan indicate that for some time the City has been aware of its own discriminatory policies and reputation. The Plan itself indicates that in order to achieve reasonable minority representation among its "Public Safety" employees (a designation apparently encompassing almost exclusively firefighters), the City for three years should hire only black and hispanic persons for such positions. (Ex. 2, p. 111). Fewer minority persons will be hired pursuant to this Order (102) than the Affirmative Action Plan indicates should be hired in the "Public Safety" area (141). No voluntary efforts have been made by the City to comply with its own affirmative action goals for the Fire Department.

[13] *See* n. 8, *supra.*

> it is in the city's interest to have its minority citizens represented on its fire and police departments and every other department of the city,.... We — the city would accept gladly and willingly some adequate remedy that this Court might devise to make sure our minorities are — qualified minority citizens are on that department, and that would help us in reaching some of our affirmative action goals which in our competitive field we're handcuffed.

(Tr. at 100). Moreover, this Court is of the opinion that merely ordering nondiscriminatory hiring in the future, even coupled with the requirement that the City actively recruit minority candidates, would be inadequate either to remedy past discrimination or "to assure prospective minority candidates that applying is no longer futile." *Association Against Discrimination in Employment* v. *City of Bridgeport, supra,* 594 F.2d at 311 n. 13. "The effects of...past violation[s] of minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential." *Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 631.[14]

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[14] In its prior opinion, this Court indicated that "there appears to be no bad faith on the part of defendants in using the exam or selecting the respected management consulting firm of Hay to develop the exam." 454 F.Supp. at 757. Defendants and defendants-Intervenors now argue that the imposition of a hiring order would be inconsistent with this prior finding of good faith. Good faith, however, is not a defense to a charge of discrimination based on the use of discriminatory tests. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). And while good faith may be a factor to be considered in fashioning a remedy, the prior finding of good faith did not apply to defendants' lack of recruitment of minority applicants or treatment of individual minority persons.

A hiring order should not be imposed if the reverse discriminatory effects of such an order "fall upon 'a small number of readily identifiable' non-minority persons." *Association Against Discrimination in Employment* v. *City of Bridgeport, supra,* 594 F.2d at 310, *quoting Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 429. In fashioning its hiring order, then, this Court begins with the proposition that none of the firefighters presently on the force should be "bumped" in order to make room for minority firefighters. *EEOC* v. *Local 628,* 532 F.2d 821, 830 (2d Cir. 1976), *on remand* No. 71 Civ. 2877 (S.D.N.Y. Jan. 19, 1977), *aff'd* 565 F.2d 31 (2d Cir. 1977). An order mandating the entry-level hiring of a specified number or ratio of minority persons, however, is a permissible means of remedying past discrimination because it is not possible readily to identify those non-minority persons who are being "kept out" by virtue of the order. *Cf. Patterson* v. *Newspaper & Mail Deliverers' Union,* 514 F.2d 767, 773-75 (2d Cir. 1975), *cert. denied* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). "[A]n entry-level quota has a more diffuse and amorphous effect upon reverse discriminatees than a quota used to bump incumbents or hinder promotion of present numbers of the work force." *Id.* This Court, having made an explicit finding of past discrimination, *cf. Regents of University of California* v. *Bakke,* 438 U.S. 265, 300-301, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Fullilove* v. *Kreps,* 584 F.2d 600, 607 (2nd Cir. 1978), *cert. granted,* 441 U.S. 960, 99 S.Ct. 2403, 60 L.Ed.2d 1064 (1979), concludes that no undue reverse discrimination would result from the imposition of an entry-level hiring order in this case. *Cf. Weber* v. *Kaiser Aluminum & Chemical Corp.,* ______ U.S. ______, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), *Prate* v. *Freedman,* 583 F.2d 42, 46-47 (2d Cir. 1978).

The Second Circuit Court of Appeals has drawn a distinction between hiring "goals" and hiring "quotas." *See Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 628 n.3. A hiring goal lapses when a specified number or ratio is achieved, whereas a quota involves the relatively permanent use of a specified hiring ratio. *Id.* While it would appear that a finding of long-continued and egregious discrimination is a prerequisite to the imposition of either a goal or a quota, *Id.* at 631, this Court concludes that the imposition of a hiring goal should be approached somewhat less "gingerly" than the imposition of a quota. *Cf. Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427. The imposition of a quota involves a relatively permanent intrusion into the hiring practices of an employer, whereas the imposition of a hiring goal may be, as it is in this case, the only effective means of remedying past discrimination. Accordingly, this Court will impose a hiring goal that will ensure that the minority composition of the total number of firefighters hired since January 1, 1971 (the date on which this Court has found that the City first violated Title VI) reasonably reflects the minority composition of the population of the relevant labor market, the City of Bridgeport. The imposition of a hiring goal of this magnitude, coupled with the requirement that the City actively recruit minority applicants and hire in a nondiscriminatory fashion once the goal is achieved, will be sufficient in this Court's opinion to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965). This Court, therefore, specifically declines to impose a hiring quota.

II.

Since January 1, 1971, the City has hired 152 white, one hispanic, and three black firefighters. The hiring of an additional 102 minority persons would create a situation in which the percentage of minority firefighters hired since January 1, 1971 would roughly equal the percentage of minority persons in the population of the city.[15] In theory, these 102 positions should go to those minority individuals who would have been hired had there been no discrimination. Recognizing that, at this point in time, it is impossible to identify these individuals with any certainty, the Court must exercise its discretion to fashion an equitable means of selecting the individuals to be hired. *See*

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[15] Evidence at the hearing on remand established that the City has an immediate need for 121 firefighters. There is ample room, then, for the 102 whose hiring will be required by this opinion.

Kirkland v. *New York State Department of Correctional Services, supra,* 531 F.2d at 9 (Mansfield, J., dissenting).

As has been noted earlier, the firefighters examinations administered in 1971 and 1975 were not job-related and, therefore, did not distinguish qualified applicants from those who were not qualified. Applicants with some college education tended to do less well on the 1975 exam than similiar applicants without any college education. Those persons who have been hired from the 1975 list have previously been found by this Court to have performed well as firefighters, 454 F.Supp. at 759, and there is no evidence that those hired from the 1971 list have not similarly performed well. The Court finds, then, that those persons who can satisfy the requirements, other than passing an exam, that have been imposed on those who have been hired from the 1971 or 1975 lists are as qualified to become firefighters as those actually hired. Those minority applicants for the 1971 or 1975 tests who meet those qualifications but have not been offered employment have been victims of discrimination and should be offered employment as firefighters. If there are insufficient persons in the group described above to fill all 102 positions, the remainder should be filled, if possible, by persons who were deterred by the City's discriminatory practices from applying to take either the 1971 or the 1975 exam. While recognizing that the process of identifying this latter group of individuals may be complex administratively, the Court concludes that making the effort to identify these individuals is the best available mean of ensuring that the benefits from this remedy order enure to individuals who have been the victims of the City's discriminatory practices. Moreover, procedures are available to ease the administrative burden.

Back pay also is an appropriate remedy in this case. Awards of back pay "provide a spur to speed the elimination of discriminatory practices, and they give full compensation to the injured parties." *Stryker* v. *Register Publishing Co.,* 423 F. Supp. 476, 478 (D. Conn. 1976). The Supreme Court has made clear that "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421. Accordingly, this Court will order that back pay be awarded to up to 102 individuals who can prove that they have been victims of the City's discriminatory policy and practice.

In accordance with the foregoing, the following hereby is Ordered:

A. OLD EXAMS

The test batteries given as written exams to firefighter candidates in 1971 and 1975 shall not again be used to test firefighter applicants.

B. HIRING

(1) The City promptly shall prepare a list of 102 minority persons to be offered positions as firefighters. This list shall include:

> (a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City. Said agility test and medical examination shall be given to these persons within 120 days of this order, shall be preceded by both published notice and individual written notice to each of those black and hispanic persons who filed applications for the 1971 or 1975 firefighters test, and shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(b) Sufficient additional minority persons chosen in accordance with this subparagraph to reach the total of 102 persons. The persons chosen under this subparagraph shall be individuals who prove to the special master that after January 1, 1971 they were deterred by the City's discriminatory practices from applying to take either the 1971 or 1975 test, and who pass both the agility test and medical examination to be administered by the City. The following procedure shall be used to identify these persons:

(i) The special master shall, in a manner he deems appropriate, publicize the fact that he will be accepting applications from minority persons who claim that after January 1, 1971 they were deterred by the City's discriminatory practices from filing applications for either the 1971 or 1975 firefighters test. The special master shall set and publicize a reasonable deadline for the submission of such applications.

(ii) The special master shall process the applications in a manner consistent with this opinion, and may hold hearings or other proceedings as he deems appropriate.

(iii) Each individual applicant shall bear the burden of proving by a preponderance of the evidence that he or she would have applied but for the City's discriminatory practices.

(iv) The special master need not process every application, but may choose among them at random until sufficient applications have been processed to complete the list of 102 minority persons to be offered employment.

(v) The agility test and medical examinations shall be administered to persons chosen by the special master at a time to be determined by the special master, and shall be preceded by written notice to the individuals to be tested and examined. The agility test and medical examination shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(c) If the procedures under subparagraphs (a) and (b) of this paragraph fail to produce sufficient individuals to fill the 102 places on the list, the City, subject to the Court's approval, promptly shall devise some other method for identifying additional minority persons to be placed on the list.

(2) Notwithstanding the above, the City shall not be obligated to place on the list the name of anyone who

(a) on or before the date of the exam for which he or she applied or would have applied but for the City's discrimination

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license; or

(iv) had not been a bona fide resident of Bridgeport for the past year; or

(b) does not possess a valid Connecticut driver's license on the date the name otherwise would be placed on the list, but

(c) nothing in this paragraph shall alter or limit the City's obligation ultimately to place 102 names on the list.

(3) As quickly as possible within the limits of the City's ability to train new firefighters, the City shall offer the 102 persons on the list active employment as firefighters and shall place those who accept on active duty. The City shall make a good faith effort to maximize its ability to train firefighters. No other individuals shall be hired as firefighters until all of the individuals on the list have been offered active employment.[16]

(4) Subsequent appointments to the rank of firefighter shall be made in strict accordance with Titles VI and VII of the Civil Rights Act of 1964.

(5) The City actively shall recruit minority persons to compete for future vacancies in the Fire Department.

(6) This Court shall retain jurisdiction over this case until the provisions of this Order have been complied with.

C. SENIORITY

The City is prohibited from giving any promotional examinations to firefighters hired from lists generated by the 1971 or

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[16] The United States, as *amicus,* has suggested with some force that requiring the City to hire only minority persons until a specified goal is reached will have the unwanted effect of creating segregated training programs and a racially stratified work force within the Fire Department. The Government's suggested means of avoiding these undesirable consequences is to impose a 50% interim hiring goal that would lapse when the proportion of minority persons employed by the Fire Department reached some predetermined reasonable level. While this suggestion has obvious merit, the Court is reluctant to enter such an order because it could significantly increase defendants' "front pay" liability. In addition, a 50% interim goal would be unacceptable because it would not result in the hiring of enough minority persons soon enough. The Court would not be opposed, however, to some more realistic plan that would permit immediate integrated hiring while remaining otherwise consistent with the remedial goals sought to be achieved through this Order. Defendants are invited to submit such proposals as they deem appropriate.

1975 tests until such time as all the firefighters hired pursuant to B(1)(a) & (b) become qualified to take the promotional examinations.[17] Although the Court is specifically declining to alter the three-year time-in-grade requirement that now exists for firefighters who wish to take the promotional examination for the positions of Pump Engineer and Lieutenant, the Court is not opposed to a reduction of this requirement. The plausibility of reducing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior firefighting experience of a number of the plaintiffs.

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[17] The Supreme Court has held that "the denial of seniority relief to victims of illegal racial discrimination is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy, and making persons whole for injuries suffered through past discrimination.'" *Franks* v. *Bowman Transportation Co.,* 429 U.S. 747, 771 (1976), *quoting Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 421 (1975). Seniority relief is appropriate in this case. The relief granted here will not result in anyone being "bumped," *EEOC* v. *Local 628,* 532 F.2d 821, 830 (2d Cir. 1976), *on remand* No. 71 Civ. 2877 (S.D.N.Y. Jan. 19, 1977). *aff'd* 565 F.2d 31 (2d Cir. 1977), and those whose promotion may be delayed have been "the modest beneficiar[ies], vis-a-vis the minority work force, of a policy that discouraged minority persons" from obtaining employment on the Fire Department. *Patterson* v. *Newspaper & Mail Deliverers' Union,* 514 F.2d 767, 775 (2d Cir. 1975), *cert. denied* 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). The seniority relief granted here, then, will not have undue "reverse discrimination" effects. *Cf. Weber* v. *kaiser Aluminum & Chemical Corp.* _____ U.S. _____, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979).

D. BACK PAY

(1) The City promptly shall generate a list of up to 102 persons to be awarded back pay. This list shall include:

(a) Each of the persons whose name is placed on the hiring list pursuant to B(1)(a) or (b).

(b) If fewer than 102 persons qualify under subparagraph (a) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons who applied to take either the 1971 or 1975 exam whose names are not placed on the hiring list pursuant to B(1)(a) but who prove to the special master, by a preponderance of the evidence, that on the date of the exam for which they applied, they

(i) were eighteen years of age,

(ii) had graduated from high school or earned a high school equivalency certification.

(iii) possessed a valid Connecticut driver's license,

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraph (a) of this paragraph, the special master shall notify each of the individuals potentially eligible for back pay under this subparagraph that they may file applications for back pay awards, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(c) If fewer than 102 individuals qualify under subparagraphs (a) and (b) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 102. Persons chosen in accordance with this subparagraph shall be minority persons whose names are not placed on the hiring list pursuant to B(1)(b) but who prove to the special master by a preponderance of the evidence that but for the defendants' discriminatory practices they would have applied to take either the 1971 or 1975 exam, and that on the date of the exam for which they would have applied they

(i) were eighteen years of age,

(ii) had graduated from high school, or earned a high school equivalency certification,

(iii) possessed a valid Connecticut driver's license,

(iv) had been a bona fide resident of Bridgeport for the past year, and

(v) would have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 102 individuals qualify for back pay under subparagraphs (a) and (b) of this paragraph, the special master, in a manner he deems appropriate, shall publicize the fact that he will be accepting applications from individuals who claim to meet the requirements of this subparagraph, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 102 places on the back pay list.

(d) If fewer than 102 individuals qualify under subparagraphs (a), (b), & (c) of this paragraph, the remaining places on the back pay list shall remain vacant.

(2) Each of the persons whose name is placed on the back pay list shall be entitled to accumulated back pay at the time his or her name is placed on the list.

(3) For the purposes of this order, back pay shall include

(a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are or were entitled under union contracts, including all increments, together with interest and, for those individuals whose names are on the hiring list established pursuant to this Order, "front-pay" until the date the individual is offered active employment,

(b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

(4) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1971 test shall be awarded back pay from October, 1973 (two years prior to the filing of the first complaint with the EEOC).

(5) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1975 test shall be awarded back pay from October, 1976 (when the first firefighter was hired from the 1975 list).

(6) While considerations of back pay liability may not enter into determining whose names shall be placed on the list, the City may, if it chooses, offer active employment to those on the hiring list in an order that will minimize its liability for "front

pay." It would seem to make sense in terms of both economics and social policy for the City to offer active employment first to those with the least present income.

E. SPECIAL MASTER

The Court has had the good fortune to obtain the assistance of David S. Maclay, Esquire, of Westport, Connecticut, a member of the Bar of this Court, as a special master. The special master shall oversee the implementation of this Order. It shall be his duty to hear individual claims in order to determine those persons entitled to have their names placed on the lists, and to compute the back pay to which these persons may be entitled. The special master shall file a final report with this Court and may file such interim reports from time to time as he shall deem advisable. The special master shall be entitled to reasonable compensation by defendants for his services.

F. COSTS AND ATTORNEYS' FEES

Plaintiffs hereby are granted their court costs and reasonable attorneys fees to date. The amount of such fees shall be set by the Court after a hearing to be scheduled in the future. Costs and attorneys' fees for work done in the future shall be fixed in such manner as the Court may determine is appropriate.

The Revenue Sharing Act

The Revenue Sharing Act, 31 U.S.C. § 1242, confers upon this Court the power to order the suspension, termination, or repayment of revenue sharing funds when a governmental unit receiving such funds has been found to have discriminated in employment on the basis of race, color, or national origin. The Court reserves decision, pending compliance with this Order, as to whether to impose any remedy pursuant to this Act. As noted in its earlier decision, the Court views the termination of federal funding as a last resort. 454 F. Supp. at 753, *citing generally United States* v. *City of Chicago,* 549 F.2d 415, 449 (7th Cir. 1977).

Conclusion

The Court finds that defendants have violated Titles VI and VII of the Civil Rights Act of 1964 and the Revenue Sharing Act. Judgment in accordance with this opinion shall enter for the plaintiffs on their complaint. Defendants' counterclaim and defendants-intervenors' cross-complaint are dismissed. Pending compliance with this judgment, the Court retains jurisdiction and reserves decision on whether to impose a remedy under the Revenue Sharing Act.

IT IS SO ORDERED.

APPENDIX C

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT

et al., Plaintiffs-Appellees-Cross-Appellants,

v.

CITY OF BRIDGEPORT et al., Defendants-Appellants,

and

Bridgeport Firefighters for Merit Employment, et al., Intervening Defendants-Appellants.

Nos. 413, 414 and 595, Dockets 78-7400, 78-7406 and 78-7431.

United States Court of Appeals, Second Circuit.

Argued Dec. 18, 1978.

Decided Feb. 23, 1979.

Class action was brought on behalf of blacks and Hispanics attacking civil service employment examination for city fire department as violative of Title VII of Civil Rights Act of 1964. The United States District Court for the District of Connecticut, T. F. Gilroy Daly, J., held the examination invalid, 454 F.Supp. 751, and enjoined use of the test and ordered affirmative relief, 454 F.Supp. 758, and defendants appealed and plaintiffs cross-appealed. The Court of Appeals, Feinberg, Circuit Judge, held that: (1) before imposing very broad hiring quota relief for use by city of allegedly invalid fire fighter test which had disparate impact in violation of Title VII of Civil Rights Act of 1964, court was required to expressly consider the relevant authorities ties and either make appropriate findings or state why it believed they were not necessary; (2) court was also required to give close consideration to effect of its interim orders permitting the hiring of 84 firefighters, 81 of whom were white, and (3) district court was also required to consider city's offer to lower the passing grade on a test which court had invalidated in order to increase the number of minority applicants who would be eligible for appointment.

Order vacated and cause remanded.

Raymond B. Rubens, Bridgeport, Conn., for defendants-appellants City of Bridgeport, et al.

J. Daniel Sagarin, Bridgeport, Conn. (Sagarin & Rutkin, Bridgeport, Conn., of counsel), for intervening defendants-appellants Bridgeport Firefighters for Merit Employment, Inc., et al.

David N. Rosen, New Haven, Conn. (Michael P. Koskoff, Bridgeport, Conn., of counsel), for plaintiffs-appellees-cross-appellants Association Against Discrimination in Employment, et al.

Before FEINBERG, MULLIGAN and GURFEIN, Circuit Judges.

FEINBERG, Circuit Judge:

This appeal arises out of a Title VII class action in the United States District Court for the District of Connecticut, brought by 10 black and hispanic applicants to the Bridgeport Fire Department, and by an organization representing plaintiffs' interests, against various municipal officials and agencies and the City of Bridgeport.[1] In the district court, several incumbent white firefighters and an organization they had formed in response to the action were allowed to intervene as defendants. Defendants and the intervenors appeal from an order of Judge T F. Gilroy Daly that invalidated an examination for the job of firefighter, enjoined defendants from using that test, and directed them to hire minority applicants for that job in ratios and under conditions specified in the order. The judge's two opinions, one dealing with liability and the other with remedy, are reported at 454 F.Supp. 751, 758. Plaintiffs cross-appeal, complaining of the judge's order in various aspects. For reasons set forth below, we remand the case to the district court for further consideration in accordance with this opinion.

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[1] The officials named as defendants, individually and in their official capacities, are the members of the Bridgeport Civil Service Commission, the Director of the Civil Service Commission, the members of the Bridgeport Board of Fire Commissioners, and the Fire Chief and Mayor of Bridgeport.

I.

In February 1972, members of the Bridgeport Civil Service Commission, as is the case here, were sued in an action under 42 U.S.C. §§ 1981 and 1983 by black and Puerto Rican applicants for positions in the Bridgeport Police Department, who claimed that the Department's employment policies discriminated against them.[2] In March 1972, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., became applicable for the first time to states and political divisions as employers.[3] Perhaps motivated by these two events at least in part, the City of Bridgeport joined in March 1972 with 10 other Connecticut municipalities to hire a supposedly expert firm to develop a racially unbiased examination for the position of firefighter. Such action was well advised in view of the lack of blacks and hispanics in the Fire Department. In 1975 when these groups comprised about 41 percent of Bridgeport's labor force, its Fire Department had 427 whites, one hispanic and no blacks. No manner of legal argument can justify this unpleasant fact. From 1972 to 1975, while the new test was being developed, defendants gave no tests and hired only 28 white firefighters from a 1971 list, apparently now discredited. In March 1975, the new test was administered to over 700 people, and defendants created a list of almost 200 successful applicants ranked in order. Only eight minority applicants were on the list.

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[2] See *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975). See also *Bridgeport Guardians* v. *Bridgeport Police Dep't*, 431 F.Supp. 931 (D.Conn. 1977); *Armeno* v. *Bridgeport Civil Service Comm'n*, 446 F.Supp. 553 (D.Conn. 1978).

[3] Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972).

In September 1975, plaintiffs filed the complaint in this case alleging that the discriminatory hiring and promotion practices of the Bridgeport Fire Department violated Title VII.[4] The intervening defendants were allowed in the litigation in July 1976. Shortly thereafter, when the City indicated that it wanted to begin hiring firefighters from the 1975 list, plaintiffs moved for a preliminary injunction, challenging the 1975 test as discriminatory. After a chambers conference before Judge Jon O. Newman, all the parties consented to an order which allowed defendants to fill one-half of the then current vacancies, and the City hired 40 firefighters from the list. In June 1977, the parties consented before Judge Robert C. Zampano to a similar order, which authorized the hiring of 44 more firefighters.

In October 1977, plaintiffs were certified as representatives of the class of all black and hispanic victims of defendants' alleged employment discrimination. Thereafter, Judge Daly conducted an 11-day nonjury trial on the issues of liability, at which a number of expert witnesses testified. In July 1978, the judge ruled in favor of plaintiffs. 454 F.Supp. 751. The judge noted that plaintiffs could prove a prima facie violation of Title VII by showing either that defendants had intentionally treated minorities differently or that the 1975 test had a disparate impact on them. See, e.g., *Furnco Construction Corp.* v. *Waters,* _____ U.S. _____, 98 S.Ct. 2943, 2952-53, 57 L.Ed.2d 957 (1978) (Marshall, J., concurring and dissenting); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The judge found for plaintiffs on the latter theory relying on the following data:

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[4] Plaintiffs also asserted claims under 42 U.S.C. §§ 1981 and 1983 but later withdrew them.

> [A]t the time the firefighters exam was given, minorities constituted 41% of Bridgeport's population, but only 2% of its Fire Department.
>
> The firefighters exam did little to alter this imbalance.... In terms of the pass rate, minority candidates passed with one-third the frequency of nonminority candidates; a 9% minority pass rate as compared with a 27% nonminority pass rate.

454 F.Supp. at 754. Since disparate impact was shown, the judge held that defendants had the burden of proving that the 1975 test was substantially job related. See *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 393 (2d Cir. 1973). Judge Daly found that defendants did not meet this burden because of deficiencies in preparation of the test and in selection of the passing score. The judge also noted that defendants' efforts to recruit minorities to take the examination had been unsatisfactory, although he observed that

> there appears to be no bad faith on the part of defendants in using the exam or in selecting [a] respected management consulting firm...to develop the exam. Defendants made a substantial effort to obtain an exam that would withstand judicial scrutiny.

454 F.Supp. at 757. Since the judge found for plaintiffs on the theory of disparate impact, he did not reach any claim of intentional discrimination.

After a one-day hearing devoted to remedy issues, the judge issued a "Remedy Order," which granted sweeping affirmative relief, including hiring quotas. 454 F.Supp. 758. In addition to declaring the 1975 test invalid and enjoining its use in the future, the judge ordered that the City immediately hire all blacks and hispanics who had filed applications to take the 1975 exam, if they met physical, residency and other objective requirements. Hiring of only minority applicants would continue until the number hired since 1975 equalled the number of whites hired since 1975. Thereafter, white and minority applicants would be hired on a 1:1 ratio until the number of minority firefighters in the Department totalled 125.[5] These provisions were incorporated into an order, dated August 4, 1978, which is the subject of the appeal and cross-appeal now before us.[6]

II.

On the main appeal, defendants first strenuously urge that the district judge erred in finding the 1975 test discriminatory.[7] Defendants claim that the judge misconstrued the burden of persuasion that they had to meet, that the judge improperly adopted as a matter of law a theory of employment testing that had been justifiably rejected by the consulting firm, and that defendants' selection of an appropriate employment test was an administrative decision that cannot be overturned if there is substantial evidence to support it. With regard to the remedy provisions, defendants particularly attack the imposition of a quota, which they contend is unconstitutional, barred by section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and unwarranted on the facts of this case. Plaintiffs rejoin in kind, arguing that the judge applied proper legal standards in determining the unlawfulness of the 1975 test, that his factual findings were not clearly erroneous, that the hiring quota was an appropriate, indeed moderate, exercise of discretion, and that the provision for monetary relief did not go far enough.[8]

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[5] The order also included provisions regarding promotion, retroactive seniority, back pay and attorneys' fees.

[6] The judgment was stayed by another panel of this court in November 1978.

[7] Hereafter, unless otherwise indicated, we will use defendants to refer to both appellants and to the intervenors, Bridgeport Firefighters for Merit Employment, Inc., et al.

Included in these contending arguments are issues of the gravest kind, which have been the subject of intensive scrutiny in this and in other courts, and have not yet been definitively decided at the highest level. See, e.g., *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *DeFunis* v. *Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). See also *Davis* v. *County of Los Angeles,* 566 F.2d 1334 (9th Cir. 1977), cert. granted, 437 U.S. 902, 98 S.Ct. 3087, 57 L.Ed.2d 1132 (June 19, 1978) (argued Dec. 5, 1978, see 47 U.S.L.W. 3406); *Weber* v. *Kaiser Aluminum & Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977), cert. granted, _____ U.S. _____, 99 S.Ct. 608, 58 L.Ed.2d 676 (1978). We recognize, however, our obligation to resolve these questions as best we can, guided by the decisions to date in the Supreme Court and by our own precedents. However, the state of the record as it comes to us in this case gives us pause, for the following reasons:

1. In his brief memorandum "Remedy Order," issued after a short hearing on remedy issues, the district judge did not refer to any of this court's recent decisions dealing with quotas, e.g., *EEOC* v. *Local 638,* 565 F.2d 31 (1977); *EEOC* v. *Local 14, International Union of Operating Engineers,* 553 F.2d 251 (1977); *Chance* v. *Board of Examiners,* 534 F.2d 993 (1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977); *EEOC* v. *Local 638,* 532 F.2d 821 (1976); *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d

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[8] Plaintiffs on cross-appeal argue that the court erred in limiting back pay to those minority persons who actually applied to take the 1975 exam and are appointed pursuant to the court's order, and in excluding those who took the exam in 1975 but no longer desire appointment or no longer meet the prerequisites for appointment and those who were deterred from applying by defendants' past discriminatory practices, *see Int'l Bhd. of Teamsters* v. *United States, supra,* 431 U.S. at 364-71, 97 S.Ct. 1843.

420, rehearing en banc denied, 531 F.2d 5 (1975), cert. denied, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Patterson* v. *Newspaper & Mail Deliverers' Union,* 514 F.2d 767 (1975), cert. denied, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976); *Rios* v. *Enterprise Association Steamfitters Local 638,* 501 F.2d 622 (1974); *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387 (1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F.2d 1333 (1973), cert. denied, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *United States* v. *Wood, Wire & Metal Lathers International Union, Local 46,* 471 F.2d 408, cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973). These cases have been the occasion for some strong differences of opinion, reflecting in large part the conflicting views also held in other courts[9] and indeed, in the nation as a whole on the propriety of quota relief. Looking to the decisions of our own court, it is reasonably clear that for some of its members quota relief can constitutionally be justified only if necessary to redress "a clear-cut pattern of long-continued and egregious racial discrimination," and if the reverse discriminatory effects of the quota do not fall upon "a small number of readily identifiable" nonminority persons. *Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427, 429. See also *EEOC* v. *Local 638, supra,* 532 F.2d at 828. We do not suggest that these conditions on imposition of quotas reflect the views of all members of the court, see *Kirkland* v. *New York State Department of Correctional Services, supra,* 531 F.2d 5 (Mansfield, J., dissenting from denial of rehearing en banc, joined by Kaufman, C. J., and Oakes, J.), or even of all members of this panel,[10] but the decisions cited above indicate that these views command considerable support.

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[9] Compare, e.g., *Boston Chapter, NAACP, Inc.* v. *Beecher,* 504 F.2d 1017, 1026-28 (1st Cir. 1974) cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Contractors Association* v. *Secretary of Labor,* 442 F.2d 159, 171-74, 176-77 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *Morrow* v. *Dillard,* 580 F.2d 1284, 1291-96 (5th Cir. 1978); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed. 139 (1974); *United States* v. *Local 212, IBEW,* 472 F.2d 634 (6th Cir. 1973); *United States* v. *City of Chicago,* 549 F.2d 415, 436-37 (7th Cir.), cert. denied, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *Carter* v. *Gallagher,* 452 F.2d 315, 327 (8th Cir.) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 552-54 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) with, e.g., *Oburn* v. *Shapp,* 521 F.2d 142, 150 n. 20 (3d Cir. 1975); *Sledge* v. *J. P. Stevens & Co.,* 585 F.2d 625, 644-50 (4th Cir. 1978); *Morrow* v. *Crisler, supra,* 491 F.2d at 1058 (Clark, J., concurring), id. at 1060 (Roney, J., joined by Bell & Ainsworth, JJ., concurring specially), id. at 1061 (Coleman, J., dissenting), id. at 1064 (Gee, J., concurring in part and dissenting in part); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971) (original panel decision), modified, 452 F.2d 327. See also *Hull* v. *Cason,* 151 Cal. Rptr. 438 (Calif. Ct. App. 1978); *Hiatt* v. *City of Berkeley,* 149 Cal. Rptr. 155 (Ct. App. 1978).

Defendants characterize the district judge's order here as granting "the broadest quota hiring remedy...in any municipal employment testing case, including those in which there had been findings of intentional discrimination."[11] Whether or not this statement is accurate, the quota relief here is very broad, and before imposing it the district judge should expressly consider the relevant authorities and either make appropriate findings or state why he believes they are not necessary. The findings might include, e.g., whether the court is relying on discrimination between 1972 and 1975 or prior to 1972, and, if so, on what theories, see, e.g., *Hazelwood School District* v. *United States,* 433 U.S. 299, 309 & n. 15, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *United Airlines, Inc.* v. *Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, and why the quota required the hiring of minorities and non-minorities in approximately a 1:1 ratio when minorities constituted only roughly 11 percent of those who took the test. See *EEOC* v. *Local 14, supra,* 553 F.2d at 256-57; *Vulcan Society* v. *Civil Service Commission, supra,* 490 F.2d at 398-99. The district court also should take into account, to the extent relevant, cases of this circuit decided since its original order. See, e.g., *Fullilove* v. *Kreps,* 584 F.2d 600, 606-09 (2d Cir. 1978); *Prate* v. *Freedman,* 583 F.2d 42 (2d Cir. 1978).

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[10] See *EEOC* v. *Local 638, supra,* 532 F.2d at 833-34 (Feinberg, J., concurring); *Patterson* v. *Newspaper & Mail Deliverers' Union, supra,* 514 F.2d at 775 (Feinberg, J., concurring).

[11] Brief for intervenors at 26.

2. During the course of this litigation, the district court, as outlined above, twice authorized defendants to hire firefighters from the list resulting from the 1975 test. The first time, the order of Judge Newman provided, in relevant part:

> [T]he defendants may make at any time appointments to the Bridgeport Fire Department of a number of firefighters equal to one-half the number for which the city warrants there is and will remain an immediate need and adequate funding. In the event the Court should order a hiring plan, these appointments will be counted as part of such plan.

Pursuant to this order, defendants hired 40 firefighters from the 1975 list. Under a similar arrangement, almost a year later, defendants hired 44 more firefighters from the list. Only three of these 84 positions went to black or hispanic applicants.

It is apparent that these hirings represented a partial compromise of contending views to meet the City's pressing need for firefighters, a sensible attempt at accommodation under the circumstances. But the implications of such an agreement are unclear. The 84 firefighters thus employed apparently received permanent, not temporary, appointments. Were that not so, the district judge probably could have remedied the allegedly discriminatory test results by ordering the prompt preparation (in consultation with representatives of plaintiffs)[12] of a properly job-related test[13] and more energetic recruitment of minority applicants to take it, and by then filling all jobs — including the 84 just referred to — in a nondiscriminatory fashion. While this course is still a possibility,[14] we recognize that conversion of court-supervised hirings from permanent to temporary would destroy legitimately held expectations. On the other hand, the district judge pointed out that

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[12] See *Chance* v. *Board of Education,* 496 F.2d 820, 823 (2d Cir. 1974); *Chance* v. *Board of Examiners,* 458 F.2d 1167, 1179 & n. 23 (2d Cir. 1972).

> these men [the 84 already hired] have not demonstrated that they are intellectually more qualified to be firefighters than the applicants who failed. Moreover, since testimony at the remedy hearing indicated that these eighty-four men are performing their duties adequately, it is fair to assume that all of the applicants who are able to pass the same agility test and

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[13] We agree with the judge's observation:

The Court also finds it peculiar that exams, such as the firefighter exam, tend to place so little emphasis on physical ability. It would seem that the physical ability necessary for a qualified firefighter is neither more difficult to identify nor more complicated to measure than the intelligence level of a qualified firefighter.

454 F.Supp. at 758 n.8. See also *Vulcan Soc'y* v. *Civil Serv. Comm'n, supra,* 490 F.2d at 397-98.

Plaintiffs have suggested that merely giving a new nondiscriminatory exam, even with active recruitment of minority applicants, is inadequate to overcome a long history of notorious discriminatory hiring policies and quota relief is necessary to assure prospective minority candidates that applying is no longer futile. We express no view on this theory since it is unclear whether the district court made such a finding.

[14] Unexpectedly, the City apparently suggests retesting all the 1975 applicants, including those now on the job, if we affirm the invalidation of the 1975 list, Brief for City of Bridgeport at 11, 13, but plaintiffs reject the notion, Brief for Appellees at 59 n. 39. We note that such a procedure might perpetuate the effects of the 1975 discriminatory examination, since presumably the 84 candidates who have gained on-the-job experience would have an advantage on any job-related test.

medical examination will be capable of performing at least as well as the eighty-four men already hired.

454 F.Supp. at 759.

This observation, coupled with the prior two compromise agreements for hiring, raises the question whether it can fairly be said that in return for such job protection for the 84 firefighters already hired, all parties impliedly agreed that if the test were held invalid, 84 blacks and hispanics could then be ordered hired. Indeed, plaintiffs make precisely that argument to us.[15] Such a quota, imposed as part of a court-supervised settlement, would be subject to unique considerations. Cf. *Prate* v. *Freedman, supra,* 583 F.2d at 47; *Patterson* v. *Newspaper & Mail Deliverers' Union, supra,* 514 F.2d 767; *Weber* v. *Kaiser Aluminum & Chemical Corp., supra,* 563 F.2d 216. Conversely, the intervenors argue that plaintiffs might have attempted to enjoin preliminarily any use of the 1975 test but chose to avoid an early hearing and agreed to immediate appointment of some firefighters (including three minority group members) in exchange for guaranteed funding for positions which might, but not necessarily would, be assigned to minority group members.[16] The implications of this view are not helpful to plaintiffs. In any event, the district court did not explicitly consider all the implications of the two prior hiring orders,[17] and should do so in the first instance.

3. Finally, we turn to an equally troubling issue that directly affects not only the remedy ordered by the judge, but also the basic finding of liability. The district court stated that "the ulti-

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[15] Brief for Appellees at 41.

[16] Brief for Intervenors at 54, 55.

[17] The City argues that it never would have hired the 84 firefighters who passed the 1975 test if it had known that this would make it liable for a potentially bankrupting back pay award to 84 minority firefighters who were not hired. Brief for City of Bridgeport at 16-17.

mate effect of the exam turns upon the score used to differentiate between passing and failing" and that this "critical choice" had to be "scrutinized with particular care" because this decision was partly responsible for the disparate impact of the exam. All those who scored in or above the 75th percentile of those taking the exam passed. The passing score was 12. The judge then determined that the "only explanation" for the passing score of the 75th percentile was "the arbitrary requirement of Bridgeport's City Charter" that candidates "answer correctly at least 75% of all questions on civil service exams." 454 F.Supp. at 756-57 & n. 6. The judge correctly characterized application of this requirement to the firefighter exam as bearing "no relation" to job proficiency,[18] particularly since the consultant firm that prepared the exam did not recommend a passing score. Indeed, defendants conceded in the district court that the test was not scored properly and urged the judge to lower the passing score, which would also have eliminated most of the disparate effect of the exam. The district court dealt with this contention as follows:

> The discriminatory impact of the exam would have been significantly alleviated if the passing score had been designated as 6. If this score had been used, 55.2% of the Blacks and 68.6% of the Whites would have passed. Plaintiffs contend that even with such an alteration of the passing score, the exam would be discriminatory because only 9.2% of the total number of candidates to pass would be members of minority groups. The force of this contention is weakened by the fact that only 10.9% of those who applied to take the firefighters exam were members of minority groups.

454 F.Supp. at 756 n. 5.

Defendants repeat to us their offer to lower the passing score, stressing that the district court found that the City had made a good faith effort to develop a job-related test, that a lower passing score would eliminate the disparate impact, and that there was substantial evidence that such a passing score was justifiable. A cut-off score of six would apparently qualify approximately 50 identified blacks and hispanics as well as over 300 whites and some 70 racially unidentified persons, and the effectiveness of the list could be continued, by order of the court, until all passing candidates have been hired.[19] We do not regard this as a frivolous argument. The principal, although not the only, basis of the district court's finding of violation of Title VII was the disparate impact of the test at the arbitrary 75th percentile passing score, and we do not find the district judge's response to the City's argument, quoted above, thoroughly convincing. It may be that if the passing mark had originally been six, there would have been no showing of disparate impact in the first place and that, hence, there would have been no ground for deciding whether the test was job-related. See *Albermarle Power Co.* v. *Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). The percentage of identified blacks and hispanics who would then have passed the examination (about 50 in number) would be much closer to the percentage of whites passing than was the case with the 75th percentile passing score.[20] That would not be the end perhaps because, while the earlier history of discrimination before 1972 could not be controlling in this Title VII case, see text following note 11 *supra,* the use of a ranking rather than a qualifying examination could nevertheless still be argued as having had a disparate impact. See note 19 *supra.* The problem is complicated moreover by the earlier hiring of 84 whites and three minority persons under an ambiguous interim agreement. It may be that some plan which accepts the reduction of the passing mark to six and treats the list as a qualifying list without ranking, subject to passing physical and medical examinations, would, as an interim measure, afford substantial minority representation and be acceptable as part of an overall settlement that the parties may still discover to be the most sensible course of all.

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[18] In fact, the passing score bore no relation to the City Charter's requirement, since the percentile score indicates only how well an applicant did in relation to other candidates, and not the number of questions answered correctly. 454 F.Supp. at 756-57 n. 6.

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[19] Defendants make clear they would not object to such an extension of the life of the list past the two years provided by law. However, plaintiffs argue that since there would still be fewer positions available in the Fire Department than the number of applicants who scored six or above, many would still have a long wait. They further point out that if applicants were hired in order of rankings from the exam, minority candidates generally would be hired later, and thus the exam would have a significant discriminatory impact even though lowering the score closes up the discrepancy in passing rates. However, this effect could be eliminated by random selection of appointees from the group of passing candidates, rather than use of rankings.

In conclusion, we vacate the order appealing from and remand the case to the district court for further consideration of the matters discussion in this opinion.

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[20] Plaintiffs argue that even a passing score of six still would result in a discriminatory impact in the passing rates. We do not express an opinion on this issue, but merely suggest that the district court might want to explore further the implications of lowering the passing score.

Plaintiffs also point out that lowering the passing score was suggested as a remedy, not as a defense to liability. We have found no authority on whether an employer who selects a cut-off score and defends it until the test has been found not job-related can then avoid the implications of that finding by adjusting the passing score to a point where the disparate impact is arguably insignificant.

APPENDIX D

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., Roosevelt Johnson, Craig Kelly, Charles Herd, Robert Lewis, William Cary, Charles R. Young, Herman Agosto, Harmin Linares, Ismael Pamales, Salvador Perez, and on behalf of all others similarly situated, Plaintiffs,

v.

CITY OF BRIDGEPORT, Nicholas Panuzio, Robert W. Weeks, Jr., Edward F. Daley, Julius Nobili, William G. Pjura, Frank J. Deprinzio, Alan Cohen, Bridgeport Civil Service Commission, Charles E. Porzelt, Andrew Gottfried, Salvatore S. Spadaccino, Charles J. Dougiello, John J. Hannon, John F. Gleason, David Sullivan, William D. Miklus, Albert Schwarz, Bridgeport Board of Fire Commissioners, Individually and in their official capacities, Defendants.

Civ. No. B-75-268.

United States District Court,
D. Connecticut.

July 14, 1978.

Class action was brought on behalf of Blacks and Hispanics attacking civil service employment examination administered to candidates for city fire department. Trial was held on liability issue. The District Court, Daly, J., held that: (1) claim that city's federal revenue-sharing funds should be terminated was best considered at the remedy phase; (2) to prevail on claim of disparate impact plaintiffs were not required to demonstrate an intent to discriminate; (3) exam had a disparate impact on minorities where they constituted 41% of the population but only 0.2% of fire department, and (4) exam could not be upheld as job related where, among other things, exam was based only on perfunctory analysis of fire fighter's job ranking, procedure used to distinguish among fire fighters was inadequate and only explanation for passing score used was arbitrary requirement of city charter.

Judgment for plaintiffs on liability issue.

See also, D.C., 454 F.Supp. 758.

David N. Rosen, New Haven, Conn., Michael P. Koskoff, Bridgeport, Conn., for plaintiffs.

Raymond B. Rubens, Bridgeport, Conn., for defendants.

J. Daniel Sagarin, Bridgeport, Conn., for intervenors.

DALY, District Judge.

RULING ON LIABILITY

Plaintiffs, as representatives of the class of Blacks and Hispanics who reside in the City of Bridgeport, Connecticut, are attacking the 1975 Civil Service Exam administered to candidates for Bridgeport's Fire Department. Defendants are the City of Bridgeport, several of its officials, the Bridgeport Civil Service Commission and the Bridgeport Board of Fire Commissioners. A group of Bridgeport's firefighters, Bridgeport Firefighters for Merit Employment, Inc., have been permitted to intervene to assure that the viewpoints of all interested persons are represented.

This opinion is limited to the question of defendants' liability. After extensive discovery and several pretrial conferences, this Court decided to bifurcate the complex factual claims of liability from the question of the appropriate remedy. The liability aspect of the case has been tried to the Court and carefully briefed in thorough post-trial memoranda. On the basis of the credible evidence, the Court finds that Bridgeport's 1975 firefighters exam had a disparate impact and that this exam was not job-related.

Plaintiff's claim that Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e, *et seq.*, and the anti-discrimination provision of the Revenue Sharing Act, 31 U.S.C. § 1242(a), have been violated. The violation of Title VII is based on the alternative contentions that plaintiffs have been subjected to disparate treatment and that defendants' firefighters exam had a disparate impact. These two theories of discrimination are well explained by the Supreme Court in *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854, 52 L.Ed.2d 396 (1977);

> " 'Disparate treatment' such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment....
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive, we have held, is not required under a disparate impact theory" (citations omitted). *Id.*

See *Furnco Construction Corp.* v. *Waters,* _____ U.S. _____, _____ — _____, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Because plaintiffs have demonstrated that the firefighters exam violated the disparate impact theory of Title VII, the Court does not reach the question of whether plaintiffs have been subjected to disparate treatment. Moreover, the Court is reserving judgment on plaintiffs' claim that Bridgeport's federal revenue sharing funds should be terminated. As suggested by intervenors, this claim is best considered subsequently when the Court fashions a remedy for plaintiffs. It should be noted, however, that the Court sees little benefit to plaintiffs in the termination of federal funding and views such a step as one of last resort. See generally *United States* v. *City of Chicago,* 549 F.2d 415, 449 (7th Cir. 1977).

The legal principles that apply to a claim of disparate impact are well-settled.[1] In *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) the Supreme Court had occasion to summarize the three-step analysis that governs proof of such Title VII claims. The Court explained that to prevail on the basis of a disparate impact theory plaintiffs must first demonstrate that defendants' use of facially neutral hiring requirements has a significantly disparate impact on plaintiffs. That is, plaintiffs need only prove that defendants' seemingly unbiased hiring standards have resulted in a significant pattern of discriminatory employment. If plaintiffs adduce ample proof of such a discriminatory pattern, they have established a *Prima facie* case of a racially disparate impact and the burden shifts to defendants.[2] See 29 C.F.R. § 1607.3 (1977). In the Second Circuit this shifting of the burden means defendants become saddled not only with the burden of going forward, but also with the burden of persuasion. *Vulcan Soc. of N.Y. City Fire Dept., Inc.* v. *Civil Serv. Comm'n.*, 490 F.2d 387, 393 (2d Cir. 1973). By way of rebuttal, defendants must then demonstrate that their employment requirements are substantially related to job performance. The question whether Bridgeport's firefighters exam was job-related is the critical issue in this case. The third and final step in the analysis is reached only if defendants successfully show that their employment requirements "have a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). If defendants prove their requirements are job-related, plaintiffs have an opportunity to rejoin by showing that other selection techniques are available which would advance defendants' interests in maintaining high caliber employees, but which would not have a similar discriminatory effect. *Dothard* v. *Rawlinson, supra,* 433 U.S. at 329, 97 S.Ct. 2720; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

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[1] For a list of cases in which written employment examinations are challenged on the basis of a racially disparate impact, see *Bridgeport Guardians* v. *Bridgeport Police Dept.,* 431 F.Supp. 931, 933 (D.Conn. 1977).

[2] Intervenors argue that the analysis outlined in *Dothard* v. *Rawlinson, supra,* is no longer appropriate and that plaintiffs must demonstrate an intent to discriminate in addition to a disparate impact. This contention is meritless. The case upon which intervenors principally rely, *Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), states that a showing of discriminatory animus is an essential element of discriminatory claims based on equal protection. *Accord, Regents of the University of Calif.* v. *Bakke,* ______ U.S. ______, ______ ____ n. 27, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *Chance* v. *Board of Examiners,* 561 F.2d 1079, 1087 (2d Cir. 1977). Plaintiffs' claim, however, is based on Title VII and not equal protection. Therefore, *Washington* v. *Davis, supra,* and its progeny are inapposite.

The statistical data presented at trial by plaintiffs leave no doubt that the firefighters exam had a disparate impact on the named plaintiffs and the class of persons they represent. Between the taking of the 1970 census and the 1974 census the minority population in Bridgeport increased from 25.3% to 41%. Of the 153,500 residents of Bridgeport in 1974, 27% were Black and 14% were Hispanics. In marked contrast to the racial composition of the City's population, there was but one minority firefighter in 1975 out of 428 members of the Bridgeport Fire Department. Thus, at the time the firefighters exam was given, minorities constituted 41% of Bridgeport's population, but only 0.2% of its Fire Department.

The firefighters exam did little to alter this imbalance. Only three of the eighty-four candidates who successfully passed the exam were members of minority groups. In terms of the pass rate, minority candidates passed with one-third the frequency of non-minority candidates; a 9% minority pass rate as compared with a 27% nonminority pass rate. In addition, a statistical test performed by plaintiffs' expert revealed that the difference between the mean exam scores of minority candidates and nonminority candidates could have been the result of chance in less than one in 10,000 samples. Plaintiffs' expert also introduced statistical evidence that demonstrated that the disparity between minority and nonminority performance on the exam was not the result of differences in a candidate's formal education.[3] Assuming that every candidate who passed the firefighters exam is ultimately hired, minorities will constitute something less than 1% of Bridgeport's Fire Department. Therefore, if the results of the exam remain unaltered, the operative effect of the exam will be to perpetuate the composition of an already racially imbalanced fire department. The disparate impact of the firefighters exam, especially when viewed in the light of the Bridgeport Fire Department's prior racial imbalance, compels the conclusion that the exam should be upheld only upon a persuasive showing that it was substantially related to the performance of firefighters.

The most difficult question raised by plaintiff's claim is whether the 1975 exam is job-related. In search of an answer, the attorneys and the Court have been led by the conflicting testimony of two experts, who spoke in an alien tongue, through a labyrinth of statistical analysis that might well have intimidated Odysseus. While the Court does not concur with plaintiffs in all of their criticisms of the exam, it is apparent that the exam suffers from several serious defects.

Before discussing the specific defects in the exam, a brief digression is necessary to explain how the exam was developed. The firefighters exam was the result of a concurrent criteria-related validity study. Such studies begin with the collection of data on present employees. These employees are ranked by their superiors and then given a battery of tests that may or may not concern the employee's knowledge of his field. After these tests are scored, a statistical analysis is performed to determine whether the highly ranked employees have performed similarly on any of the tests. If the highly ranked employees uniformly have performed either better or worse than employees with low rankings on any of the tests, then these tests are presumed to identify desirable employees.

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[3] In fact, plaintiffs' expert testified that there was an inverse relationship between a candidate's exam score and his formal education. That is, candidates of the same race and comparable age did more poorly on the firefighters exam if they had received some college education. This seemingly anomalous result is most probably the result of the weighing of scores on the PRF Understanding test. See the discussion of this test in the text at 755 *infra.*

In the case of Bridgeport's firefighters exam, data on firefighters in several Connecticut cities were gathered. Statistical analysis of these data revealed that there was a correlation in Bridgeport and Hartford between highly ranked firefighters and their test scores on three of the tests in the test battery.[4] In the case of the FIT Mechanics and the PRF Social Recognition Tests, there was a direct correlation between highly ranked firefighters and high test scores, whereas in the case of the PRF Understanding Test, highly ranked firefighters tended to receive low test scores. These three tests were then administered to the 1975 candidates, and the results were evaluated by weighing positively high scores on the first two tests and weighing negatively high scores on the PRF Understanding Test. Plaintiffs contend that the development of this exam was "shoddy." Although the Court does not agree with this assessment, there were deficiencies in the preparation of the exam and in the selection of a passing score.

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[4] The management consulting firm that developed the exam took the additional step of attempting to eliminate those tests in which there was a significant difference between the scores of Blacks and Whites. While this was a commendable measure, the Court is not persuaded that this additional step made the test unbiased. Of necessity the consulting firm's analysis was based on the evaluation of a small number of Blacks, most if not all of whom had already demonstrated an ability to perform well on civil service exams. In addition, the firm was never told to eliminate tests that had a discriminatory impact on Hispanics.

PREPARATION OF EXAM

Chief among the deficiencies in the exam was its preparation. It would seem that a thorough job analysis would be fundamental to the development of a job-related exam. However, the testimony introduced at trial indicated that the firm which had developed the exam, Hay Associates (Hay), relied on a perfunctory analysis of a firefighter's job. Plaintiffs quite properly note that the insufficient data gathered by Hay concerning job characteristics of a firefighter tainted all subsequent efforts to develop a job-related exam. For example, because a detailed list of critical work behaviors was not developed, the supervisory personnel who ranked the firefighters used only a very generalized list of job qualities. Not only did this list lack specificity, but there was no differentiation between attributes on the basis of their importance. As a result, a supervisor's high ranking of a firefighter for having a good sense of "public relations" had the same effect on a firefighter's score as a high ranking for "composure under pressure." While both attributes are commendable in a firefighter, Hay's methodology provided no means by which their relative importance could be considered.

The Court also finds that the ranking procedure used to distinguish among firefighters was inadequate. Hay had supervisory personnel rank firefighters over whom they had authority in a linear order from best to worst. This technique has several defects when used to evaluate small groups that vary in size. First, it assumes that the best firefighter under one supervisor is better than the second best firefighter under another supervisor. This criticism is particularly important here because all the supervisors were ranking members of small groups; almost one-half of the firefighters were in groups of no more than five and one-quarter were in groups of two or three. The consequence of the ranking procedure is that a firefighter who was the second best out of a group of two was equated with a firefighter who was the second best out of a group of six. The possibility of obtaining valuable data from this ranking procedure is further diminished by the fact that the supervisory personnel who performed the rankings were given insufficient training.

The final deficiency in the exam's preparation concerns the exclusive use of volunteers as a sample group. Plaintiffs' expert testified that complete reliance upon volunteers in a concurrent validity study often results in skewed data. He stated that within his field volunteers are considered a notoriously unrepresentative sample because their motivation tends to differ from the motivation of their peers.

SELECTION OF PASSING EXAM SCORE

Not only is the exam's preparation suspect, but the manner in which it was used is improper. Specifically, plaintiffs and intervenors criticize the passing score as being arbitrary. Although the ultimate effect of the exam turns upon the score used to differentiate between passing and failing scores, Hay did not recommend a passing score. Apparently, this failure was due to the fact that the ranking procedure used in the preparation of the exam provided no information upon which to base such a recommendation. The critical choice of a passing score must be scrutinized with particular care because this decision was in large part responsible for the disparate impact of the exam.[5]

The only explanation given for the passing score used was the arbitrary requirement of Bridgeport's City Charter.[6] See

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[5] The discriminatory impact of the exam would have been significantly alleviated if the passing score had been designated as 6. If this score had been used, 55.2% of the Blacks and 68.6% of the Whites would have passed. Plaintiffs contend that even with an alteration of the passing score, the exam would be discriminatory because only 9.2% of the total number of candidates to pass would be members of minority groups. The force of this contention is weakened by the fact that only 10.9% of those who applied to take the firefighters exam were members of minority groups.

[6] The uncontroverted testimony at trial revealed that the passing score used by Bridgeport was selected because the City Charter requires candidates to answer correctly at least 75% of all questions on civil service exams. Since such a requirement was meaningless on the test battery developed by Hay, Bridgeport used the seventy-five percentile marks

Bridgeport Guardians, Inc. v. *Bridgeport Civil Serv. Comm'n,* 482 F.2d 1333, 1338 (2nd Cir. 1973). Unlike the passing score used in the detective exam that was upheld in *Bridgeport Guardians* v. *Bridgeport Police Dept.,* 431 F.Supp. 931 (D.Conn. 1977) (*Guardians II*), the passing score for the firefighters exam bore no relation to "normal expectations of proficiency." 29 C.F.R. § 1607.6 (1977). In *Guardian II,* the Court found that the test had been designed so that a successful candidate would have had to obtain a higher score on the exam than had been obtained by most other candidates who had previously taken the same test. In contrast to the firefighters exam, the detective exam challenged in *Guardians II* had been planned so that the passing score mandated by Bridgeport's Charter would reflect a determination of desired proficiency. The fact that the passing score was not "based on sufficiently sound approach," *Guardians II,* 431 F.Supp. at 490, is itself ample reason in this case to conclude that the exam was not job-related.

Having determined that the exam was not sufficiently job-related, the inquiry could end without considering whether a better examination is available. However, the Court feels that it should address defendants' repeated protestations that it is being required to do the impossible — to devise a perfect exam. While the Court finds that Bridgeport is making advances in its employment practices, it cannot be said that the City has done all that is within its power to obtain highly qualified minority firefighters.

The firefighters exam represented a decided improvement over some of the earlier civil service exams employed by Bridgeport. See, e.g., *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n, supra.* Furthermore, based on the evidence before the Court, there appears to be no bad faith on the part of

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as the passing score. The selection of this passing score automatically meant that 75% of the candidates who took the exam would fail. In its brief, Bridgeport quite properly concedes that there is no statistical relation between the passing score required by its Charter and the passing score it used in the firefighters exam.

defendants in using the exam or in selecting the respected management consulting firm of Hay to develop the exam. Defendants made a substantial effort to obtain an exam that would withstand judicial scrutiny. Over a period of one and one-half years some 2745 man-hours were spent in the development of the exam at a cost of approximately $100,000 in federal funds. It should also be noted that the use of written civil service exams as the critical component of the hiring process is itself an important improvement over the political spoils system that had long been employed in many municipalities.

However, the Court finds that defendants' recruiting efforts were unsatisfactory. Until quite recently Bridgeport's Fire Department had only one black officer and two black firefighters. Not surprisingly, the City's reputation for hiring minority firemen was deplorable. Little was done to overcome this reputation. The credible evidence indicated that Bridgeport used only one of three local radio stations to advertise the firefighters exam. And, although some recruiting of minority candidates was done, these efforts were neither initiated nor sponsored by Bridgeport.[7] Thus, only 10.9% of those who applied to take the firefighters exam were members of the minority groups while 41% of the total population were members of minority groups.

The Court also believes that defendants have not considered all plausible alternatives for distinguishing qualified from unqualified firefighter candidates. The underlying issues in all cases involving employment examinations is what constitutes a "qualified" employee, and how can he or she be identified in an unbiased and culturally neutral manner. The three-step analysis used to evaluate plaintiffs' disparate impact claim is merely an orderly method of assuring that potential employees are afforded an equal opportunity and that employers are permitted to maintain the caliber of employee that they desire. The firefighters exam represents but one unsuccessful attempt at developing a workable method of accomplishing these objectives. The possible solutions to this problem are subject to more hypotheses than either party has suggested.[8]

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[7] It bears mentioning that those who had worked conscientiously to recruit minority candidates felt that their credibility was all but destroyed by the firefighters exam.

CONCLUSION

Defendants have not sustained their burden of proving that the exam was job-related. There are numerous defects in the exam's preparation, and the record is devoid of evidence that the passing score was designed to reflect a proficiency determination. The aggregate effect of these deficiencies compels the conclusion that the 1975 firefighter exam violated Title VII and must not be used in the future. A hearing has been scheduled for July 20, 1978 in order to develop remaining questions concerning an appropriate remedy.

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[8] For example, it does not seem axiomatic to the Court that multiple-choice tests must be the critical component of a process aimed at identifying qualified firefighters. While this type of test has demonstrated some ability to "predict" subsequent performance of individuals on other written exams, it does not follow that multiple-choice exams are adequate to predict all types of human behavior. In fact, the repeated failure of civil service exams to qualify as job-related, see note 1, suggests that these tests are inadequate to the task of predicting complex patterns of behavior (e.g., those behaviors which would distinguish an average firefighter from an exceptional firefighter). The Court also finds it peculiar that exams, such as the firefighters exam, tend to place so little emphasis on physical ability. It would seem that the physical ability necessary for a qualified firefighter is neither more difficult to identify or more complicated to measure than the intelligence level of a qualified firefighter.

APPENDIX E

ASSOCIATION AGAINST DISCRIMINATION IN EMPLOYMENT, INC., Roosevelt Johnson, Craig Kelly, Charles Herd, Robert Lewis, William Cary, Charles R. Young, Herman Agosto, Harmin Linares, Ismael Pomales, Salvador Perez, Individually and on behalf of all others similarly situated, Plaintiffs.

v.

Robert W. WEEKS, Jr., Edward F. Daly, Julius Nobile, William G. Pjura, Frank J. Prinzio, Bridgeport Civil Service Commission, Alan Cohen, Charles E. Porvelt, Andrew Gottfried, Salvatore S. Spudaccino, Charles J. Dougiello, John J. Hannon, Bridgeport Board of Fire Commissioners, John F. Gleason, John Mandanici, and City of Bridgeport, all individually and in their official capacities, Defendants.

Civ. A. No. B-75-268.

United States District Court,
D. Connecticut.

July 31, 1978.

Addendum To Remedy Order

Sept. 18, 1978.

After deciding that a city's fire fighters' examination violated Title VII of the Civil Rights Act of 1964, the District Court, Daly, J., entered an order detailing the remedy mandated by that statute.

Order entered.

See also, D.C., 454 F.Supp.751.

David N. Rosen, New Haven, Conn., Michael P. Koskoff, Bridgeport, Conn., for plaintiffs.

J. Daniel Sagarin, Bridgeport, Conn., for intervenors.

Raymond B. Rubens, Bridgeport, Conn., for defendants.

REMEDY ORDER

DALY, District Judge.

In an earlier decision filed on July 14, 1978, this Court ruled that the City of Bridgeport's 1975 firefighters exam violated Title VII, 42 U.S.C. §200e *et seq.* Since this ruling the Court has held a hearing, conducted several chambers conferences and requested briefs in an effort to fashion an appropriate remedy.[1] This order details the remedy mandated by Title VII and the body of caselaw that it has generated.

The fashioning of a remedy must begin with the premise that the firefighters exam administered in 1975 did not distinguish qualified from unqualified applicants. As the Court explained in its ruling on liability, the exam was not job-related. Moreover, the testimony of Bridgeport's Fire Chief at the remedy hearing indicated that there might be an inverse correlation between those who passed the exam and those who are most qualified to be firefighters. The Chief stated that the two most important attributes of a firefighter are superior physical ability and intelligence. Yet, the evaluation of firefighter applicants placed little weight on physical ability and weighed negatively high scores on an understanding test. Bridgeport's hiring process in 1975 merely required applicants to complete a pass/

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[1] Much to the Court's chagrin, the defendant City of Bridgeport did not submit a brief on the remedy aspect of this case. To a certain extent, the disadvantage at which the Court was put by this failure was offset by the superb brief filed by counsel for plaintiffs.

fail physical agility test. In addition, the written examination penalized those who indicated that they were "inquiring, curious, analytic, exploring, intellectual, reflective, incisive, investigative, probing, logical, scrutinizing, theoretical, astute, rational [and] inquisitive."[2] Therefore, not only was the written exam not job related, but the City's hiring process did not require successful applicants to demonstrate those attributes which the Fire Chief said were essential for firefighters.

Because of the City's ongoing need for firefighters, eighty-four men who passed the written exam, as well as the agility test and the medical examination, have been hired.[3] As should be apparent from what has already been said, these men have not demonstrated that they are intellectually more qualified to be firefighters than the applicants who failed. Moreover, since testimony at the remedy hearing indicated that these eighty-four men are performing their duties adequately, it is fair to assume that all of the applicants who are able to pass the same agility test and medical examination will be capable of performing at least as well as the eighty-four men already hired.

The following order is directed at remedying the disparate impact of the firefighters exam by placing those frustrated applicants on a parity with the eighty-four men who have been hired. Therefore, it is ORDERED that:

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[2] These are the characteristics that the PRF Understanding Test is designed to identify. As noted in the Court's earlier ruling on liability, the fact that applicants of the same race and of comparable age obtained lower exam scores if they had received some college education may well be the result of the way the PRF Understanding Test scores were weighed.

[3] In 1976 Judge Newman permitted the City to hire forty firefighters, and in 1977 Judge Zampano permitted the hiring of an additional forty-four firefighters.

A. OLD EXAM

The test battery given as a written exam in 1975 to firefighter candidates shall never be used again;

B. HIRING

1. The City of Bridgeport shall promptly hire the Blacks and Hispanics who filed applications with the civil service office for the 1975 firefighters exam and who pass both the agility Test and the medical examination to be administered by the City. Said agility test and medical examination shall be no more rigorous than the test and examination administered to the eighty-four firefighters already hired.

The agility test and the medical examination shall be given within 120 days of this order and shall be preceded by both published notice and individual written notice to each of those Blacks and Hispanics who filed applications for the 1975 firefighters exam. Notwithstanding the above, the City is not obligated to hire anyone who:

(a) was not eighteen years of age on or before the day of exam (February 21, 1975);

(b) had not graduated from high school or earned a high school equivalency certification as of the day of the exam;

(c) did not possess a valid motor vehicle license for the State of Connecticut as of the day of the exam;

(d) does not presently possess a valid Connecticut motor vehicle license;

(e) was not a bona fide resident of Bridgeport from March 22, 1974 to March 22, 1975; or

(f) has not been a bona fide resident of Bridgeport for the past year.

2. Thereafter, in making appointments to the rank of firefighter, the City shall assemble a pool of Black and Hispanic candidates qualified for the position (hereinafter "the minority pool") and shall make appointments and promotions from such pool as follows:

(a) Until the number of minority candidates hired by the Bridgeport Fire Department since 1975 equals the number of White candidates hired since 1975, all current and future vacancies in the rank of Firefighter shall be filled from the minority pool, unless the hiring mandated by paragraph B(1) results in the hiring of minority candidates equal to the number of White candidates hired since 1975;

(b) Thereafter, until the number of minority persons working in the Bridgeport Fire Department at the rank of Firefighter or above equals 125, one half of all vacancies shall be filled from the minority pool. Such vacancies shall be filled by making appointments of candidates from the minority pool alternately with appointments of candidates not from this pool;

(c) Variation from the hiring formulas set forth above will be permitted only upon a showing made to the Court of either unavailability of qualified Black and Hispanic candidates or other good cause.

3. Criteria and procedures to be used in determining qualification for the minority pool and plans for recruiting qualified candidates for the minority pool shall be submitted to the court for review and approval before being used. Exemption from state and local restrictions will be approved where necessary to effectuate this decree.

4. Subsequent appointments to the rank of Firefighter shall be made in strict accordance with Bridgeport's affirmative action plan and Title VII of the Civil Rights Act of 1964.

5. This Court shall retain jurisdiction over this case until the provisions of this order have been complied with, and any entrance criterion to the job of Firefighter which the defendants propose to use togehter with the use to be made of its results shall, prior to use, be submitted to the Court for review and approval together with satisfactory evidence that the proposed criterion will not result in a disparate impact upon Blacks and Hispanics.

C. SENIORITY

1. Each of the persons hired pursuant to paragraph B(1) shall be granted the same seniority as the twenty-one firefighters appointed on October, 1976.

2. In order to put all of the 1975 firefighter candidates on a parity, the City is prohibited from giving any promotional exams for firefighters until such time as all the firefighters hired pursuant to B(1) shall be qualified to take the promotional exam. Although the Court is specifically declining to alter the three year time-in-grade requirement that now exists for firefighters who wish to take the promotional exam for the positions of Pump Engineer and Lieutenant, the Court is not opposed to a reduction of this requirement. The plausibility of reducing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City of Bridgeport may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior firefighting experience of a number of the plaintiffs.

D. BACKPAY

Each of the persons hired pursuant to paragraph B(1) is entitled to backpay. For the purposes of this order backpay shall include:

(a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are entitled under applicable union contracts, including all increments, together with interest and "frontpay" for presently qualified candidates until the date of hire;

(b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

E. SPECIAL MASTER

The Court has had the good fortune to obtain the assistance of David S. Maclay, Esquire, of Westport, Connecticut, a member of the bar of this Court, as a special master. The special master shall oversee the implementation of this order. It shall be his duty to hear individual claims in order to determine those persons entitled to be hired under paragraph B(1), and to compute the backpay to which these persons are entitled. The special master shall file a final report with this Court and may file such interim reports from time to time as he shall deem advisable. The special master shall be entitled to reasonable compensation for his services.

F. COSTS AND ATTORNEYS' FEES

Plaintiffs are hereby ordered to be entitled to their court costs and reasonable attorneys' fees to date. The amount of such costs and fees shall be set by the court after a hearing, to be held on September 15, 1978. Costs and attorneys' fees for work done in the future shall be fixed in such manner as the Court may determine.

ADDENDUM TO REMEDY ORDER.

The defendant City of Bridgeport has requested a partial clarification of the July 31st Remedy Order, while that Order requires the City of Bridgeport within 120 days of its effective date to administer agility tests and medical examinations to all members of the class of plaintiffs not excluded by the conditions enumerated in the Order, and within 120 days to hire, in the sense of placing on the payroll, all who pass these tests, the Remedy Order does not require that all these people be placed on duty as firefighters at one time. Rather, the Order contemplated that these people would be placed on actual duty within a reasonable time in accordance with the Department's capacity to train new firefighters.

Supplemental Appendix

81-373

Office - Supreme Court, U.S.
FILED
FEB 11 1982
ALEXANDER L. STEVAS,
CLERK

NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF BRIDGEPORT, ET AL
Petitioners,

VS.

ASSOCIATION AGAINST DISCRIMINATION
IN EMPLOYMENT, INC., ET AL
Respondents.

SUPPLEMENT TO THE APPENDIX
VOLUME THREE

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INC., et al

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(This Opinion and Order was modified on December 9, 1981. The number of job offers was reduced from 73 to 53. The reduction is explained in the Ruling on Motion for Reconsideration and the Amended Order gives the new figure)

RULING ON INTERVENING DEFENDANT'S MOTION FOR RECONSIDERATION, dated Dec. 9, 1981 .... 13a

AMENDED ORDER ON REMAND, dated Dec. 9, 1981 .... 15a

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASSOCIATION AGAINST DISCRIMINATION :
IN EMPLOYMENT, INC., ET AL, :
:
PLAINTIFFS, :
:
VS. CIVIL ACTION
NO. B 75-268
CITY OF BRIDGEPORT, ET AL, :
:
DEFENDANTS. :
:

ORDER ON REMAND

This case is again before the Court on remand from the Court of Appeals for the Second District. *See AADE* v. *Bridgeport,* 647 F.2d 256 (1981).[1] The Court of Appeals outlined ways in which the remedy order entered by this Court on August 24, 1979 should be modified. In order to further focus attention on those aspects of the Order to be changed, plaintiffs thereafter submitted a proposed order, the defendant City countered with its own proposal, and the intervening defendant filed an objection to plaintiff's proposal. With the benefit of these papers and also of oral argument, the Court enters the Order set forth below.

It should be noted that at oral argument the City urged this Court to decline to modify its Order in conformity with the Second Circuit's opinion during the pendency of the City's petition to the Supreme Court for a writ of certiorari. Because there is no stay in effect, and because the hiring order, in its original form, was entered more than two years ago, this Court sees no reason to further delay. Indeed, Judge Van Graafeiland, in his concurrence, wrote, "I think that racial harmony in Bridgeport will be advanced best by bringing this protracted litigation to a close." 647 F.2d 256, 291. This Court agrees.

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[1] The earlier stages of this litigation are reported at 454 F. Supp. 751, 758 (1978); 594 F.2d 306 (1979); and 479 F. Supp. 101 (1979).

The major, though not the only difference between plaintiffs' and the City's proposed orders is in the number of minorities to be offered jobs. The City suggests 18 as the appropriate number, apparently having arrived at this number by subtracting the number of minority persons hired or offered jobs as firefighters during some unspecified period of time from the number of persons the Court of Appeals ordered be offered jobs. For this Court to reduce the number specified in the Second Circuit's order, after the Second Circuit had been well aware of the interim hiring orders, would seem to be an impermissible tampering with that Court's mandate.[2] The Second Circuit fully considered the number of persons to whom offers should be made and expressly contemplated that 73 new minority firefighters might join the force pursuant to this Order, in addition to the 4 already employed.[3] Furthermore, the Court's failure to comment on the number of persons to whom the City made offers, but who did not accept employment, should be understood as a *sub silentio* ruling that those offerees are to have no effect on what the City now must do. Judge Kearse concluded the section of her opinion dealing with the numerical scope of the order by writing, "we simply direct that the order be modified to limit the number of minority persons to whom offers must be made, before anyone else is hired, to 73." 647 F.2d 256, 268-7. These words also render impermissible the suggestion of intervening defendants that minority persons merely be identified as prospective offerees, rather than actually be offered jobs.

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[2] On the first appeal, Judge Feinberg questioned the implications of the two interim hiring orders under which 81 nonminority and 3 minority firefighters were hired. 594 F.2d 306, 311-312. On remand, this Court viewed the interim orders as agreements between the parties in which plaintiffs agreed not to seek to enjoin hiring from the 1975 list, provided they received the City's assurances that there was an immediate need and adequate funding for the number of firefighters actually hired, and found "no reason to conclude either that the judicial approval of the hiring agreement operated to absolve defendants of any liability, or that defendants conceded by entering into the agreement that quota or any other type of relief would be appropriate." 479 F. Supp. 101, 105-106, n. 4. Neither this Court nor the Court of Appeals viewed the interim arrangements as building a credit toward the number of persons now to be offered jobs pursuant to this Order.

[3] *See* 647 F.2d 256, 286.

The following order insures compliance and provides affirmative and compensatory relief to minority persons in Bridgeport who have or had an interest in joining the fire department in entry-level positions.

It is hereby ordered:

A. Old Exams

The test batteries given as written exams to firefighter candidates in 1971 and 1975 shall not again be used to test firefighter applicants.[4]

B. Hiring

1) The City promptly shall prepare a list of 73 minority persons to be offered positions as firefighters. This list shall include:

(a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City. Said agility test and medical examination shall be given to these persons within 120 days of this order, shall be preceded by both published notice and individual written notice to each of those black and hispanic persons who filed applications for the 1971 or 1975 firefighters test, and shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.[5]

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[4] The City did not contend on appeal that either exam was job related, nor that either's impact was not discriminatory. 647 F.2d 256, 272.

(b) Sufficient additional minority persons chosen in accordance with this sub-paragraph to reach the total of 73 persons. The persons chosen under this sub-paragraph shall be individuals who prove to the special master that after January 1, 1971 they were deterred by the City's discriminatory practices from applying to take either the 1971 or 1975 test,[6] and who pass both the agility test and medical examination to be administered by the City. The following procedure shall be used to identify these persons:

> (i) The special master shall, in a manner he deems appropriate, publicize the fact that he will be accepting applications from minority persons who claim that after January 1, 1971 they were deterred by the City's discriminatory practices from filing applications for either the 1971 or 1975 firefighters test. The special master shall set and publicize a reasonable deadline for the submission of such applications.
>
> (ii) The special master shall process the applications in a manner consistent with this order, and may hold hearings or other proceedings as he deems appropriate.
>
> (iii) Each individual applicant shall bear the burden of proving by a preponderance of the evidence that he or

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[5] *See* generally 647 F.2d 256, 281-282.

[6] *See* 647 F.2d 256, 281 n. 23.

she would have applied but for the City's discriminatory practices.

(iv) The special master need not process every application, but may choose among them at random until sufficient applications have been processed to complete the list of 73 minority persons to be offered employment.

(v) The agility test and medical examinations shall be administered to persons chosen by the special master at a time to be determined by the special master, and shall be preceded by written notice to the individuals to be tested and examined. The agility test and medical examination shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(c) If the procedures under subparagraphs (a) and (b) of this paragraph fail to produce sufficient individuals to fill the 73 places on the list, the City, subject to the Court's approval, promptly shall devise some other method for identifying additional minority persons to be placed on the list.[7]

2) Notwithstanding the above, the City shall not be obligated to place on the list the name of anyone who

(a) on or before the date of the exam for which he or she applied or would have applied but for the City's discrimination

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

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[7] *See* 647 F.2d 256, 282.

(iii) did not possess a valid Connecticut driver's license; or

(iv) had not been a bona fide resident of Bridgeport for the past year; or

(b) does not possess a valid Connecticut driver's license on the date the name otherwise would be placed on the list, but

(c) nothing in this paragraph shall alter or limit the City's obligation ultimately to place 73 names on the list.

3) As quickly as possible within the limits of the City's ability to train new firefighters, the City shall offer the 73 persons on the list active employment as firefighters and shall place those who accept on active duty. The City shall make a good faith effort to maximize its ability to train firefighters. No other individuals shall be hired as firefighters until all of the individuals on the list have been offered active employment.[8]

4) Subsequent appointments to the rank of firefighter shall be made in strict accordance with Title VII of the Civil Rights Act of 1964.

5) The City actively shall recruit minority persons to compete for future vacancies in the Fire Department.

6) This Court shall retain jurisdiction over this case until the provisions of this Order have been complied with.

C. Seniority

1) The City is prohibited from giving any promotional examinations to firefighters hired from lists generated by the 1971 or 1975 tests until such time as all the firefighters hired

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[8] *See* 647 F.2d 256, 287.

pursuant to B(1)(a) and (b) become qualified to take the promotional examinations.[9] The Court is not opposed to a reduction of the current time-in-grade requirement. The plausibility of reducing the time-in-grade requirement by establishing an improved training program for all fire-fighters involves a decision that must be left at least in the first instance, to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior firefighting experience of a number of the plaintiffs.

2) In addition, each of the persons receiving backpay under Paragraph D of this Order shall be accorded full retroactive seniority equal in all respects to the rights and benefits of a person hired on the starting date of his or her backpay award, except that retroactive seniority shall not be awarded for those aspects of seniority as to which plaintiffs are awarded liquidated seniority benefits in Section D.[10] The special master is directed to prepare a schedule of all retroactive seniority benefits to which plaintiffs are entitled under this subparagraph.

D. Backpay

1) The City promptly shall generate a list of up to 73 persons to be awarded backpay. This list shall include:[11]

(a) Each of the persons whose name is placed on the hiring list pursuant to B(1)(a) or (b).

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[9] *See* 647 F.2d 256, 287.

[10] *See* 647 F.2d 256, 288.

[11] *See* 647 F.2d 256, 288 n. 35.

(b) If fewer than 73 persons qualify under subparagraph (a) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 73. Persons chosen in accordance with this subparagraph shall be minority persons who applied to take either the 1971 or 1975 exam whose names are not placed on the hiring list pursuant to B(1)(a). The City is not required to place any such person on the backpay list if it proves[12] to the special master by a preponderance of the evidence that on the date of the exam for which such person applied, such person

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license;

(iv) had not been a bona fide resident of Bridgeport for the past year, or

(v) would not have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 73 individuals qualify for backpay under subparagraph (a) of this paragraph, the special master shall notify each of the individuals potentially eligible for backpay under this subparagraph that they may file applications for backpay awards, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 73 placed on the backpay list.

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[12] *See* 647 F.2d 256, 289.

(c) If fewer than 73 individuals qualify under subparagraphs (a) and (b) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 73. Persons chosen in accordance with this subparagraph shall be minority persons whose names are not placed on the hiring list pursuant to B(1)(b) but who prove to the special master by a preponderance of the evidence that but for the defendants' discriminatory practices they would have applied to take either the 1971 or 1975 exam. The City is not required to place any such person on the backpay list if it proves to the special master by a preponderance of the evidence that on the date of the exam for which such person would have applied, such person

(i) was not eighteen years of age;

(ii) had not graduated from high school, or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license;

(iv) had not been a bona fide resident of Bridgeport for the past year, or

(v) would not have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 73 individuals qualify for backpay under subparagraphs (a) and (b) of this paragraph, the special master, in a manner he deems appropriate, shall publicize the fact that he will be accepting applications from individuals who claim to meet the requirements of this subparagraph, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 73 places on the backpay list.

(d) If fewer than 73 individuals qualify under subparagraphs (a), (b), and (c) of this paragraph, the remaining places on the backpay list shall remain vacant.

2) Each of the persons whose name is placed on the backpay list shall be entitled to accumulated backpay at the time his or her name is placed on the list.

3) For the purposes of this order, backpay shall include

(a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are or were entitled under union contracts, including all increments, together with interest and, for those individuals whose names are on the hiring list established pursuant to this order, "frontpay" until the date the individual is offered active employment,

(b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

4) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1971 test shall be awarded backpay from October, 1973 (two years prior to the filing of the first complaint with the EEOC).

5) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1975 test shall be awarded backpay from October, 1976, except that if the number of persons receiving backpay under this subparagraph exceeds the number of non-minorities hired in October 1976, the special master shall adjust the starting dates of backpay awards under this subparagraph so that the number of minorities to be paid

backpay from a given date equals the number of non-minorities hired on that date.[13]

6) While considerations of backpay liability may not enter into determining whose names shall be placed on the list, the City may, if it chooses, offer active employment to those on the hiring list in an order that will minimize its liability for "frontpay." It would seem to make sense in terms of both economics and social policy for the City to offer active employment first to those with the least present income.

7) All the persons placed on the backpay list pursuant to subparagraphs (b) and (c) of this paragraph shall receive backpay for a period ending on the date such person ceased to meet any of the City's requirements other than the written exam, or ceased to have interest in becoming a firefighter, whichever is earlier.[14]

E. Special Master

The Court has had the good fortune to obtain the assistance of David S. Maclay, Esquire of Westport, Connecticut, a member of the Bar of this Court, as a special master. The special master shall oversee the implementation of this Order. It shall be his duty to hear individual claims in order to determine those persons entitled to have their names placed on the lists, and to compute the backpay to which these persons may be entitled. The special master shall file a final report with this Court and may file such interim reports from time to time as he shall deem advisable. The special master shall be entitled to reasonable compensation by defendants for his services and expenses.

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[13] *See* 647 F.2d 256, 288.

[14] *See* 647 F.2d 256, 288-9.

F. Costs and Attorneys Fees

Plaintiffs hereby are granted their court costs and reasonable attorneys' fees to date. The amount of such fees shall be set by the Court after a hearing to be scheduled in the future. Costs and attorneys' fees for work done in the future shall be fixed in such manner as the Court may determine is appropriate.

IT IS SO ORDERED.

Dated at Bridgeport, Connecticut this 21st day of October, 1981.

/s/T. F. Gilroy Daly
T. F. GILROY DALY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASSOCIATION AGAINST DISCRIMINATION :
IN EMPLOYMENT, INC., et al,
Plaintiffs,

v. :

Civil No.
: B-75-268

CITY OF BRIDGEPORT, et al,
Defendants. :

RULING ON INTERVENING DEFENDANT'S MOTION FOR RECONSIDERATION

Intervening Defendant Bridgeport Firefighters for Merit Employment, Inc. (BFME) seek reconsideration of the Order on Remand (October 21, 1981). The motion is granted, and upon reconsideration, the Court rules as follows.[1]

Plaintiffs and BFME both request an amended order from this Court which will incorporate the Court's October 21 Order on Remand, and a portion of an October 28 letter from plaintiff's counsel. The October 28 letter, which the Court construed as a motion for reconsideration and granted, reduced the number of persons to whom the City must offer employment to fifty-three, from seventy-three as originally ordered. That reduction, not opposed by either BFME or by the City, takes account of the interim hiring of twenty minority firefighters. In the Amended Order on Remand, entered this day, that reduction is explained in note 2, which states that those twenty minority firefighters, now employed, shall be included on the list of 73 persons to be offered jobs, backpay, and constructive seniority. The effect of adding their names to the hiring list is to reduce the number of new offerees to 53.

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[1] Defendant City of Bridgeport has not joined in intervening defendant's motion for reconsideration, nor has it responded in any way, despite several phone calls from the Court's chambers to the office of counsel of record.

BFME suggests that the 20 minority firefighters' back pay award be calculated to commence in October 1976. That suggestion appears to be in accord with the instructions to the Special Master in Section D(5) of the Amended Order, and requires no further elaboration now.

The parties dispute whether three certain persons should be placed on the hiring list. BFME claims that those persons rejected an earlier offer, and plaintiffs claim they merely "deferred acceptance," but neither party has produced any evidence to support its claim. The factual dispute is to be resolved by the Special Master, and his finding will determine whether any or all of those persons are to be on the list.

The Amended Order does not give plaintiffs relief for post-October 1979 hiring of eight non-minorities, nor does it preclude such relief. It simply does not address the question of whether such relief is appropriate. Plaintiffs are free to request such relief, and the Court will entertain objections thereto if, and when, it is requested.

In accordance with the foregoing, BFME's motion for reconsideration is GRANTED, and an Amended Order on Remand is entered this day. Other objections of BFME to the Amended Order are overruled, and other portions of the October 28 letter, to the extent not addressed above, are not considered by the Court at this time.

It is SO ORDERED.

Dated at Bridgeport, Connecticut, this 9th day of December, 1981.

/s/T. F. Gilroy Daly
T. F. GILROY DALY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASSOCIATION AGAINST
DISCRIMINATION IN
EMPLOYMENT, INC., ET AL, : CIVIL ACTION
PLAINTIFFS, :
NO. B 75-268
VS. :
CITY OF BRIDGEPORT, ET AL, :
DEFENDANTS :

AMENDED ORDER ON REMAND

It is hereby ordered:

A. Old Exams

The test batteries given as written exams to firefighter candidates in 1971 and 1975 shall not again be used to test firefighter applicants.[1]

B. Hiring

1) the City promptly shall prepare a list of 73 minority persons to be offered positions as firefighters. This list shall include:

a) The black and hispanic persons who filed applications for either the 1971 or 1975 test, who have not been offered but still seek employment with the Fire Department, and who pass both the agility test and medical examination to be administered by the City.[2] Said agility test and medical examination shall be given to these persons within 120 days of this order, shall be preceded by both published notice and individual written notice to each of those black and hispanic persons who filed applications for the 1971 or 1975 firefighters test, and shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.[3]

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[1] The City did not contend on appeal that either exam was job related, nor that either's impact was not discriminatory. 647 F.2d 256, 272.

b) Sufficient additional minority persons chosen in accordance with this subparagraph to reach the total of 73 persons. The persons chosen under this subparagraph shall be individuals who prove to the special master that after January 1, 1971 they were deterred by the City's discriminatory practices from applying to take either the 1971 or 1975 test,[4] and who pass both the agility test and medical examination to be administered by the City. The following procedure shall be used to identify these persons:

> (i) The special master shall, in a manner he deems appropriate, publicize the fact that he will be accepting applications from minority persons who claim that after January 1, 1971 they were deterred by the City's discriminatory practices from filing applications for either the 1971 or 1975 firefighters test. The special master shall set and publicize a reasonable deadline for the submission of such applications.

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[2] Pursuant to interim agreements, the City hired additional firefighters during the pendency of the most recent appeal to the Second Circuit. *See* 647 F.2d at 271 n.3. Twenty of these persons are minorities. These twenty persons shall be included among the 73 persons to be offered jobs, backpay, and constructive seniority. Minorities who were not hired during the appeal, for any reason, are eligible to compete for positions on the lists the City is directed to compile under the terms of this order.

[3] *See* generally 647 F.2d 256, 281-282.

[4] *See* 647 F.2d 256, 281 n.23.

(ii) The special master shall process the applications in a manner consistent with this order, and may hold hearings or other proceedings as he deems appropriate.

(iii) Each individual applicant shall bear the burden of proving by a preponderance of the evidence that he or she would have applied but for the City's discriminatory practices.

(iv) The special master need not process every application, but may choose among them at random until sufficient applications have been processed to complete the list of 73 minority persons to be offered employment.

(v) The agility test and medical examinations shall be administered to persons chosen by the special master at a time to be determined by the special master, and shall be preceded by written notice to the individuals to be tested and examined. The agility test and medical examination shall be no more rigorous than those that have been administered to the firefighters hired since January 1, 1971.

(c) If the procedures under subparagraphs (a) and (b) of this paragraph fail to produce self-sufficient individuals to fill the 73 places on the list, the City, subject to the Court's approval, promptly shall devise some other method for identifying additional minority persons to be placed on the list.[5]

2) Notwithstanding the above, the City shall not be obligated to place on the list the name of anyone who

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[5] *See* 647 F.2d 256, 282.

a) On or before the date of the exam for which he or she applied or would have applied but for the City's discrimination

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license; or

(iv) had not been a bona fide resident of Bridgeport for the past year; or

b) Does not possess a valid Connecticut driver's license on the date the name otherwise would be placed on the list, but

c) Nothing in this paragraph shall alter or limit the City's obligation ultimately to place 73 names on the list.

3) As quickly as possible within the limits of the City's ability to train new firefighters, the City shall offer the 73 persons on the list active employment as firefighters and shall place those who accept on active duty. The City shall make a good faith effort to maximize its ability to train firefighters. No other individuals shall be hired as firefighters until all of the individuals on the list have been offered active employment.[6]

4) Subsequent appointments to the rank of firefighter shall be made in strict accordance with Title VII of the Civil Rights Act of 1964.

5) The City actively shall recruit minority persons to compete for future vacancies in the Fire Department.

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[6] *See* 647 F.2d 256, 287.

6) This Court shall retain jurisdiction over this case until the provisions of this Order have been complied with.

C) Seniority

1) The City is prohibited from giving any promotional examinations to firefighters hired from lists generated by the 1971 or 1975 tests until such time as all the firefighters hired pursuant to B(1)(a) and (b) become qualified to take the promotional examinations.[7] The Court is not opposed to a reduction of the current time-in-grade requirement. The plausibility of reducing the time-in-grade requirement by establishing an improved training program for all firefighters involves a decision that must be left at least in the first instance, to the experienced judgment of the authorities in the Fire Department. Until such time as promotional examinations are administered, the City may fill promotional vacancies on an acting or provisional basis, except that acting or provisional supervisors shall not be given any preference in the selection of permanent supervisors. In selecting acting or provisional supervisors, the City is urged to take cognizance of the prior firefighting experience of a number of the plaintiffs.

2) In addition, each of the persons receiving backpay under Paragraph D of this Order shall be accorded full retroactive seniority equal in all respects to the rights and benefits of a person hired on the starting date of his or her backpay award, except that retroactive seniority shall not be awarded for those aspects of seniority as to which plaintiffs are awarded liquidated seniority benefits in Section D.[8] The special master is directed to prepare a schedule of all retroactive seniority benefits to which plaintiffs are entitled under this subparagraph.

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[7] *See* 647 F.2d 256, 287.

[8] *See* 647 F.2d 256, 288.

D. Backpay

1) The City promptly shall generate a list of up to 73 persons to be awarded backpay. This list shall include:[9]

a) Each of the persons whose name is placed on the hiring list pursuant to B(1)(a) or (b).

b) If fewer than 73 persons qualify under subparagraph (a) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 73. Persons chosen in accordance with this subparagraph shall be minority persons who applied to take either the 1971 or 1975 exam whose names are not placed on the hiring list pursuant to B(1)(a). The City is not required to place any such person on the backpay list if it proves[10] to the special master by a preponderance of the evidence that on the date of the exam for which such person applied, such person

(i) was not eighteen years of age;

(ii) had not graduated from high school or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license;

(iv) had not been a bona fide resident of Bridgeport for the past year, or

(v) would not have passed the agility test and medical examination administered to applicants who did pass one of the exams.

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[9] *See* 647 F.2d 256, 288 n.35.

[10] *See* 647 F.2d 256, 289.

If fewer than 73 individuals qualify for backpay under subparagraph (a) of this paragraph, the special master shall notify each of the individuals potentially eligible for backpay under this subparagraph that they may file applications for backpay awards, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 73 places on the backpay list.

(c) If fewer than 73 individuals qualify under subparagraphs (a) and (b) of this paragraph, additional minority persons chosen in accordance with this subparagraph up to a maximum of 73. Persons chosen in accordance with this subparagraph shall be minority persons whose names are not placed on the hiring list pursuant to B(1)(b) but who prove to the special master by a preponderance of the evidence that but for the defendants' discriminatory practices they would have applied to take either the 1971 or 1975 exam. The City is not required to place any such person on the backpay list if it proves to the special master by a preponderance of the evidence that on the date of the exam for which such person would have applied, such person

(i) was not eighteen years of age;

(ii) had not graduated from high school, or earned a high school equivalency certification;

(iii) did not possess a valid Connecticut driver's license;

(iv) had not been a bona fide resident of Bridgeport for the past year, or

(v) would not have passed the agility test and medical examination administered to applicants who did pass one of the exams.

If fewer than 73 individuals qualify for backpay under subparagraphs (a) and (b) of this paragraph, the special master, in a manner he deems appropriate, shall publicize the fact that he will be accepting applications from individuals who claim to meet the requirements of this subparagraph, and shall set a reasonable deadline for the filing of such applications. He need not process every application, but may choose among them at random until sufficient applications have been processed to fill the total of 73 places on the backpay list.

d) If fewer than 73 individuals qualify under subparagraphs (a), (b), and (c) of this paragraph, the remaining places on the backpay list shall remain vacant.

2) Each of the persons whose name is placed on the backpay list shall be entitled to accumulated backpay at the time his or her name is placed on the list.

3) For the purposes of this order, backpay shall include

a) the sum of the value of all regular and overtime wages, fringe benefits, pension benefits, and all other benefits to which firefighters are or were entitled under union contracts, including all increments, together with interest and, for those individuals whose names are on the hiring list established pursuant to this order, "frontpay" until the date the individual is offered active employment,

b) reduced by the sum of amounts earned or earnable with reasonable diligence and amounts of any welfare or unemployment compensation received.

4) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1971 test shall be awarded backpay from October, 1973 (two years prior to the filing of the first complaint with the EEOC).

5) The individuals whose names are on the list who either applied to take or were deterred by defendants' discriminatory practices from applying to take the 1975 test shall be awarded backpay from October, 1976, except that if the number of persons receiving backpay under this subparagraph exceeds the number of non-minorities hired in October 1976, the special master shall adjust the starting dates of backpay awards under this subparagraph so that the number of minorities to be paid backpay from a given date equals the number of non-minorities hired on that date.[11]

6) While considerations of backpay liability may not enter into determining whose names shall be placed on the list, the City may, if it chooses, offer active employment to those on the hiring list in an order that will minimize its liability for "frontpay." It would seem to make sense in terms of both economics and social policy for the City to offer active employment first to those with the least present income.

7) All the persons placed on the backpay list pursuant to subparagraphs (b) and (c) of this paragraph shall receive backpay for a period ending on the date such person ceased to meet any of the City's requirements other than the written exam, or ceased to have interest in becoming a firefighter, whichever is earlier.[12]

E. Special Master

The Court has had the good fortune to obtain the assistance of Davis S. Maclay, Esquire of Westport, Connecticut, a member of the Bar of this Court, as a special master. The special master shall oversee the implementation of this Order. It shall be his duty to hear individual claims in order to determine those persons entitled to have their names placed on the lists, and to compute the backpay to which these persons may be entitled. The special master shall file a final report with this Court and may file such interim reports from time to time as he shall deem advisable. The special master shall be entitled to reasonable compensation by defendants for his services and expenses.

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[11] *See* 647 F.2d 256, 288.

[12] *See* 647 F.2d 256, 288-9.

F. Costs and Attorneys Fees

Plaintiffs hereby are granted their court costs and reasonable attorneys' fees to date. The amount of such fees shall be set by the Court after a hearing to be scheduled in the future. Costs and attorneys' fees for work done in the future shall be fixed in such manner as the Court may determine is appropriate.

IT IS SO ORDERED.

Dated at Bridgeport, Connecticut this 9th day of December, 1981.

/s/T. F. Gilroy Daly
T. F. Gilroy Daly
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS
CLERK

NOS. 81-373; 81-374

In The

Supreme Court of the United States

OCTOBER TERM, 1981

BRIDGEPORT FIREFIGHTERS FOR
MERIT EMPLOYMENT, INC., ET AL.,
Petitioners,
V.
ASSOCIATION AGAINST DISCRIMINATION
IN EMPLOYMENT, INC., ET AL.,
Respondents.

CITY OF BRIDGEPORT, ET AL.,
Petitioners,
V.
ASSOCIATION AGAINST DISCRIMINATION
IN EMPLOYMENT, INC., ET AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it proper for the courts below to hold respondent employer liable for its discrimination against applicants for an employment list which was used through May 1973 where liability to those discriminatees under the Revenue Sharing Act was undisputed and where the employer's policy of discrimination against them continued into the 300 days prior to filing charges of discrimination?

2. Did the District Court abuse its discretion in shaping a remedy for a policy of egregious unlawful hiring discrimination when it: 1) gave priority hiring and backpay relief to identified discriminatees; 2) refused to impose on discriminatees burden of showing qualifications not required of white applicants; and 3) modified seniority relief in the interests of public safety by requiring the employer to give time-in-grade credit toward promotional eligibility as part of seniority relief but permitting it to delay promotional exams until it deemed discriminatees experienced enough to take them?

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STATEMENT OF THE CASE

Respondents brought this class action in 1975 to remedy race discrimination in hiring by the Bridgeport, Connecticut Fire Department. They alleged violations, *inter alia,* of Titles VI and VII of the Civil Rights Act of 1964 and of the anti-discrimination provisions of the State and Local Fiscal Assistance Act of 1972 ("the Revenue Sharing Act"), 31 U.S.C. §1242. After a trial at which the District Court found Bridgeport liable for unlawful discrimination and gave relief, 119a,* the United States Court of Appeals for the Second Circuit vacated and remanded the District Court's order for reconsideration of, *inter alia,* the implications of a pre-trial consent order requiring Bridgeport to reserve vacancies for discriminatees should its hiring be found, as it was, to have been illegal.

The District Court Opinion

On remand, after taking further evidence, the District Court issued a comprehensive opinion, 70a, finding that Bridgeport had engaged in a continuing, clear-cut and egregious policy of race discrimination in hiring. It found that Black and Hispanic applicants were excluded by written employment tests which had a disparate racial impact and were not job-related. 71a-79a. Moreover, it found, Bridgeport had purposefully discriminated against Blacks and Hispanics by actively deterring their applications, misinforming them about test and application requirements, and other practices. 71a-79a.

The District Court held that this discrimination violated Title VI of the Civil Rights Act of 1964 from 1971 until the time of trial, 84a-86a; Title VII of the Act from March 24, 1972, the date the Act became applicable to municipalities, 84a; and the Revenue Sharing Act from January 1, 1973, 86a. It found that all the Title VII claims from 1972 to the present were timely because the City's policy of hiring discrimination was a continuing one.

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*References are to pages in the Appendix in No. 81-373.

For relief, the District Court ordered priority hiring, with seniority and backpay, of identified victims of the City's discrimination: first, applicants for the 1971 employment list (from which hiring continued until May 1973) and the 1975 employment list, and second, non-applicants who could prove they were deterred from applying within the meaning of *Teamsters* v. *United States,* 431 U.S. 324, 365-71 (1977). 94a-95a. It limited the total number of job offers and backpay awards to 102, based upon a formula estimating the number of discriminatees who would have been hired absent discrimination during the period for which liability was found. While ordering that constructive seniority for hired discriminatees should include time-in-grade credit toward eligibility for promotional examinations, the District Court left to the City the choice between letting inexperienced discriminatees take promotional tests and delaying permanent promotions until the discriminatees gained more experience. No promotional preference of any kind was ordered.

Finally, while limiting the number of hiring, backpay and seniority awards to 102, the District Court ordered, with respect to hiring only, that the City fill each of these places, offering employment to non-victims of discrimination if insufficient victims came forward. 96a. Backpay and seniority were restricted to victims of discrimination. 100a-101a.

The Court of Appeals Opinion

On appeal, the Second Circuit reversed the finding of liability under Title VI, finding that plaintiffs had not proven the requisite receipt of federal funds. 37a-43a. It affirmed the findings of liability under the Revenue Sharing Act, which were uncontested, 29a, and under Title VII. It found that since March 24, 1972 the City had engaged in a single continuing policy of discriminatory refusal to hire minorities and that acts in furtherance of that policy occurred within 300 days of the filing of charges of discrimination. Hence, subject to the two-year restrictions on relief in §706(g), the City was liable under Title

VII for the entire duration of its continuing post-Act refusal to hire minorities. 35a-37a.

With respect to relief, the Court of Appeals affirmed the essential ingredients of the District Court's remedy order, but reduced the number of persons to whom relief should be given from 102 to 73. It observed that "[t]he order gives primary consideration to actual victims of the City's discrimination and was carefully tailored to fit the violations found." 50a. It emphasized that backpay and seniority relief would be restricted exclusively to identifiable victims of past discrimination and that even with respect to hiring, any affirmative relief to non-victims of discrimination was simply a "contingent requirement," 52a:

> At this stage, of course, it cannot be known whether the total number of minority candidates who failed the exam or were deterred from applying is greater or less than the number of places on the required offering list. If the total exceeds the number of places, the affirmative relief ordered by the [district] court will have been only compensatory — requiring offers only to identifiable victims of past discrimination...."

51a-52a (footnote omitted).

Recent Proceedings on Remand

The uncertainty alluded to by the Court of Appeals has been resolved since its remand to the District Court. On October 21, 1981, as corrected November 4, 1981, the District Court issued its remand order incorporating the directives of the Court of Appeals. Since then, ninety-one rejected Black and Hispanic applicants have already given notice that their names should be placed on the required offering list.* Therefore no non-victims of discrimination will in fact receive any relief. Indeed, since rejected actual applicants receive priority over deterred non-applicants, no non-applicants will get relief. The remedy will be restricted to only a subset of the actual rejected applicant discriminatees.

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*Twenty of these persons had already been hired by agreement during the pendency of the appeal to the Second Circuit. Therefore only fifty-three offers of employment remain to be made. Moreover, other rejected applicants have additional time within which to request relief, so that the total number of applicants seeking relief seems certain to exceed ninety-one.

REASONS FOR DENYING THE WRIT

I.

IT WAS PLAINLY PROPER TO HOLD BRIDGEPORT LIABLE FOR ITS DISCRIMINATION AGAINST APPLICANTS FOR AN EMPLOYMENT LIST WHICH WAS USED THROUGH MAY 1973 WHERE LIABILITY TO THESE PERSONS UNDER THE REVENUE SHARING ACT WAS UNDISPUTED AND WHERE BRIDGEPORT'S POLICY OF DISCRIMINATION AGAINST THEM CONTINUED INTO THE 300 DAYS PRIOR TO FILING CHARGES OF DISCRIMINATION.

A. Since Bridgeport Concedes Its Liability Under the Revenue Sharing Act to the Same Discriminatees Whose Claims It Alleges are Time-barred Under Title VII, It Was Proper for Those Discriminatees to be Included in the District Court's Remedy Order.

Petitioners in No. 81-374, the City of Bridgeport, et al., (hereinafter "Petitioner Bridgeport" or "Bridgeport") argue that *United Airlines* v. *Evans,* 431 U.S. 553 (1977), bars any relief for persons who took the 1971 firefighters test because the last appointments based on the results of that test occurred in May 1973, more than 300 days prior to the filing of charges of discrimination.* But this claim should not be reviewed on certiorari because while contesting liability to 1971 test-takers under Title VII, Bridgeport has conceded its liability to these very same people for the very same discrimination under the Revenue Sharing Act.

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*Thus Bridgeport does not challenge here the rejection below of its claims that it could not "be held liable for any hiring pursuant to the list generated by its 1971 firefighters exam because that exam predated the applicability of Title VII to the City, and because its hiring from the 1971 exam was therefore pursuant to a 'bona fide merit system,' which is made lawful by §703(h) of the Act," 32a, issues raised by petitioners in No. 81-432, Civil Service Commission of the City of New York v. The Guardians Association of the New York City Police Department. Petitioners in No. 81-373, Bridgeport Firefighters for Merit Employment, Inc., et al. (hereinafter "Petitioner BFME" or "BFME") make no challenge to the liability holdings below.

After making detailed findings of discrimination, including discrimination in the administration and use of the 1971 test, the District Court specifically found that:

> For the reasons stated with respect to Title VI and VII, above, this Court finds that defendants, since January 1, 1973, have violated the Revenue Sharing Act by engaging in a policy and practice of discrimination against black and hispanic persons in regard to entry-level hiring in the Bridgeport Fire Department.

86a. On appeal, as the Court of Appeals noted, "[petitioners did] not contest the district court's conclusion that the City is liable for race discrimination under the Revenue Sharing Act dating back to January 1, 1973..." 29a, nor is any challenge made here to that conclusion.

Accordingly, Bridgeport asks this Court to engage in an empty exercise. Bridgeport's liability to persons who took the 1971 firefighters exam does not depend on the timeliness of the charge of discrimination under Title VII. The City is concededly liable in any event to discriminatees who took the 1971 test at least for its refusal to hire them between January 1, 1973 and May 1973, when it stopped hiring from the 1971 test list. Moreover, although finding a violation of Title VII from March 1972, the Courts below limited retroactive relief to the period beginning October 1973 (two years prior to the filing of the charge of discrimination). Since Bridgeport is concededly liable to 1971 test-takers under the Revenue Sharing Act back to *January* 1973, all the retroactive relief these discriminatees will receive falls within the period of conceded liability under the Revenue Sharing Act.

Accordingly, because no liability to any persons for any time has been imposed under Title VII that was not also properly imposed under the Revenue Sharing Act, it would be pointless for this Court to review this alleged claim of error.

B. The Courts Below Did Not Err in Finding That Bridgeport's Unswerving Policy of Excluding Blacks and Hispanics From Its Fire Department on the Basis of Their Race Was a Continuing Violation of Title VII.

Even if the 300-day rule were presented by this case, nothing in the unexceptionable application of the rule by the courts below calls for review by this Court. Unlike the plaintiffs in *Evans,* who objected to perpetuation of the effects of past discrimination, respondents here were not merely suffering present effects of past discrimination; they were still not being hired by the City because of its policy of racial discrimination. It was the discriminatory refusal to hire — the *violation* complained of — that was continuing, not effects from some earlier discrimination.*

It is well established after *Evans* that an employer violates Title VII so long as it continues to deny jobs on the basis of a discriminatory hiring policy. *See, e.g. Roberts* v. *North American Rockwell Corp.,* 650 F.2d 823, 827-28 (6th Cir. 1981); *Acha* v. *Beame,* 570 F.2d 57, 65 (2d Cir. 1978); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 987 (D.C. Cir. 1973); *Ridgeway* v. *International Brotherhood of Electrical Workers,* 466 F.Supp. 595, 599 (N.D. Ill. 1979) (continuing failure to permit admission to union); *cf. Higgins* v. *State of Oklahoma,* 642 F.2d 1199, 1200 n.2 (10th Cir. 1981) (continuing discrimination in promotions); *Jenkins* v. *Home Insurance Co.,* 635 F.2d 310, 312 (4th Cir. 1980) (compensation); *Patterson* v. *American Tobacco Co.,* 634 F.2d 744, 751 (4th Cir. 1980) (promotions); *Satz* v. *ITT Financial Corp.,* 619 F.2d 738, 743-44 (8th Cir.

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*Thus, for example, no relief was given to persons who had been hired but claimed continuing injury, such as lack of seniority, from discriminatory delay in their selection.

1980) (compensation); *Reed* v. *Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980) (promotions).

Bridgeport rests its claim under *Evans* (and, presumably, *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980), though that case is not mentioned in its petition) on a dispute with the factual findings of the courts below. It claims to have abandoned its discriminatory policy after 1973, Bridgeport Pet. 15-16, but the courts below found, to the contrary, that the policy continued, including use of both illegal tests and deliberate tactics to prevent minorities from winning appointment or even filing applications. 36a-37a, 71a-86a. These factual conclusions are firmly grounded in the facts found by the District Court and concurred in by the Court of Appeals. *See id.* In any event, correction of such alleged factual errors is not the purpose of review by this Court. *See Graver Tank & Mfg. Co.* v. *Linde Air Pr[illegible]cts Co.*, 336 U.S. 271, 275 (1949), *aff'd on rehearing,* 339 U.S. 605 (1950).

II.

THE REMEDY WAS A SOUND EXERCISE OF THE DISTRICT COURT'S DISCRETION TO GRANT RELIEF FROM A PATTERN AND PRACTICE OF RACE DISCRIMINATION IN EMPLOYMENT.

Petitioners raise various objections to facets of the District Court's remedy order, but all these attacks are wide of the mark because the order simply applied the rules established by this Court in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977), *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), to a proven pattern and practice of egregious racial discrimination.

A. The Order Does No More Than Make Whole Identified Victims of Discrimination.

Petitioners claim the remedy order improperly seeks to enforce racial balance in the workforce unrelated to proven cognizable violations of law and imposes a quota which is unconstitutional "reverse discrimination." Bridgeport Pet. 25-29; BFME Pet. 14-16. These complaints are unfounded because the remedy gives relief only to actual identified victims of Bridgeport's unlawful discrimination, and does not even attempt to impose racial balance on the Bridgeport Fire Department's workforce.

Since more than 73 actual applicant discriminatees have already filed for relief, no non-victims will receive anything at all from the remedy order. *See* pp. 4-5, above. Nor will any deterred non-applicants receive any relief under the order, which gives priority to rejected actual applicants. *See* 94a-95a. *Franks* and *Teamsters* establish that individual victims of a pattern and practice of discrimination — which was concededly present in this case — are presumptively entitled to relief. 424 U.S. at 772; 431 U.S. at 359-62. Giving relief to these victims is not improper reverse discrimination; it is a remedy for unlawful discrimination *against* them on the basis of their race.

No quota was imposed in this case. The 41% figure, the percentage of the applicable workforce which was Black or Hispanic workers,* was used by the court as a *ceiling* on relief, in order to recreate as nearly as possible the conditions that would have existed absent discrimination. Thus instead of giving all victims relief, the District Court limited relief to take into account the limited number of vacancies in the Department during the applicable period. So far is the order from imposing racial balance on the Fire Department that, as the Court of Appeals pointed out, the Department will be no more (and possibly less) than 13.2% Black or Hispanic when the order expires, far less than the 41% minority representation in the workforce. 61a. Petitioners have pointed to no conflict between this moderate approach and any decisions of this Court or, for that matter, any other court.

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*The 41% figure was found by the District Court, 73a, based on Bridgeport's judicial admissions, 58a-59a, n.31. The Court of Appeals found the District Court's use of the figure reasonable, 61a, and the petitions have not shown this factual determination, concurred in by two courts below, to be improper.

B. The Courts Below Properly Declined to Require Victims of Discrimination to Meet Employment Criteria Which Bridgeport Did Not Impose On Non-Victims.

Petitioners complain that the courts below improperly ordered that unqualified persons be hired as firefighters. Bridgeport Pet. 21-23; BFME Pet. 11-12. By this they apparently mean that Bridgeport should have been permitted to give minorities a written examination not given to white applicants *in addition* to requiring them to meet the same non-discriminatory criteria satisfied by the white applicants.*

The courts below handled this claim in a sensitive fashion, dealing with the singular facts of this case. Bridgeport had already hired many white firefighters on the basis of their score on a written "test"** which was demonstrated not to have any relationship whatever to job qualifications. Indeed, as the courts below pointed out, 51a n.24, 132a-33a, the evidence was that the *lower* the score on the test, the better qualified the applicant.

Accordingly, the Court of Appeals was clearly justified when it concluded:

> We find no merit in defendants' contention that the order will require the City to hire persons who are not qualified to be firefighters. All will be required to pass

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*Notably, petitioners do not suggest that incumbent firefighters be given a new, non-discriminatory job-related examination. Indeed, no new examination has been proposed or prepared. It is only discriminatees who are to take some (as yet non-existent) written test.

**The 1975 test consisted primarily of personality items like, "true or false: When I am being introduced, I don't like the person to make lengthy comments about what I have done."

> physical fitness tests, and meet the City's other requirements, other than the written test. As to the written test, its omission cannot be detrimental to the City. The district court found — and defendants do not here dispute — that these exams were not job related. Indeed, the Bridgeport Fire Chief testified that the 1975 exam might well rank lowest those candidates who would be the best firefighters. On the record in this case, therefore, it cannot be said that the minority applicants who failed the firefighters exams are any less qualified than the non-minority individuals who passed.

51a n.24.

Petitioners' claim is foreclosed by this Court's holding in *Franks* that where an employer seeks to avoid giving relief to individual applicants after it has been found guilty of classwide discrimination:

> evidence indicating the individual's lack of qualification for the...position — under non-discriminatory standards *actually applied* by [the employer] to individuals who were in fact hired — would of course be relevant.

424 U.S. at 772 n.32 (emphasis in original).

C. The District Court Properly Awarded Backpay to Victims of Bridgeport's Discriminatory Pre-trial Hiring.

Bridgeport claims that it should not be liable for its discriminatory hiring of 81 whites and only three minorities before the trial in this case because those hires were permitted by a consent order under which Bridgeport agreed to keep an equal number of vacancies available for minorities should the court find the initial hires unlawful and order a remedial hiring plan. Bridgeport Pet. 16-20. The courts below quite reasonably found that the interim orders were not intended to shield the City from liability for its discrimination.

Bridgeport claims that it was authorized by the District Court to discriminate. The courts below properly rejected this contention, which in any event poses no issues of general significance calling for this Court's review. Bridgeport fails to acknowledge that although it was permitted to make firefighter appointments, it was neither authorized nor encouraged to make them in an illegal, discriminatory fashion. The remedy ordered below was not on account of Bridgeport's having made appointments but only on account of its having made them in an illegal, racially discriminatory fashion.

Accordingly, the District Court's finding that plaintiffs did not waive their claim to backpay for Bridgeport's unlawful hiring under the interim orders, 73a n.4, is entirely reasonable and does not merit review by this Court. The findings below, which are not challenged here, that Bridgeport's discrimination was wilful and purposeful foreclose any claim to equity the City might have, even had it pointed to any special circumstances to justify denying backpay. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421-23. Since it has shown no special circumstances which would justify denial of backpay it has not begun to show any reason the District Court was *required* to deny backpay.

D. The District Court's Limited Promotional Order Was a Reasonable Means of Making Victims of Discrimination Whole With Due Regard For the Competing Requirements of Public Safety.

In an effort to assure victims of discrimination their "rightful place" seniority and prevent the replacement of racial exclusion with racial segregation of minorities in the Bridgeport Fire Department, the District Court ordered that white firefighters from the two most recent employment lists could not sit for promotional tests unless and until minority victims of discrimination were also eligible to compete for them. The City remains free to shorten the time these persons will be ineligible to compete by, for example, giving them intensive training. The District Court could simply have ordered victims to receive full rightful place seniority, making minority hirees immediately eligible to sit for promotional exams. Mindful of the City's claims as to public safety, it did less, permitting promotional vacancies to be filled exclusively by non-victims on a provisional basis. All it restricted was the right of non-minorities* who had been hired in part at the expense of these victims of discrimination to receive permanent promotional appointments at the expense of discriminatees denied their rightful place seniority. This solution, to a singular problem, presents no issues of general importance and conflicts with no decisions of this Court or any other. It provides no basis for this Court's exercise of its certiorari jurisdiction.

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*As the Court of Appeals pointed out, the restriction applies as well to the few minorities who were hired by Bridgeport. The restriction is thus racially neutral. 62a-63a.

CONCLUSION

For all the foregoing reasons, the petitions for a writ of certiorari should be denied.

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